

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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ROSIE MARTINEZ, :  
Plaintiff : 16-CV-79(NM)

-against- :  
CITY OF NEW YORK, ET AL, : United States Courthouse  
Defendant. : Brooklyn, New York

November 7, 2022  
2:30 p.m.

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TRANSCRIPT OF ORAL ARGUMENT  
BEFORE THE HONORABLE NINA MORRISON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 THE COURTROOM DEPUTY: Civil cause for an oral  
2 argument, Case No. 16-CV-79, Martinez v. City of New York,  
3 et al.

4 Counsel, please state your appearances for the  
5 record, starting with plaintiff.

6 MR. HARVIS: Good afternoon, Your Honor.

7 Gabriel Harvis of the firm Elefterakis, Elefterakis  
8 & Panek for the plaintiff, Rosie Martinez.

9 MS. FETT: Good afternoon, Your Honor.

10 Baree Fett from the law firm Elefterakis,  
11 Elefterakis & Panek for the plaintiff, Rosie Martinez.

12 THE COURT: Good afternoon.

13 MR. THADANI: Good afternoon, Your Honor.

14 Kavin Thadani from the Office of the Corporation  
15 Counsel on behalf of the defendants.

16 MS. MCKINNEY: Good afternoon, Your Honor.

17 Morgan McKinney, also with the Office of Corp.  
18 Counsel, for the defendants.

19 THE COURT: Good afternoon.

20 MR. FRANK: Good afternoon, Your Honor.

21 Jeffrey Frank, also with Corp. Counsel, for the  
22 defendants.

23 THE COURT: All right. Welcome, everyone.

24 So we are here today for oral argument on what are,  
25 by my count, about 26 or so motions in limine filed by the

1 various parties. As you know, the case was referred to me on  
2 October 28th. I kept this trial date because I know these  
3 dates are hard to get these days and you have been waiting for  
4 a trial for some time. So my apologies in advance if I ask  
5 you what may seem like very basic questions about the history  
6 of this case and some of the facts.

7 I have reviewed all of your briefing and a  
8 substantial part of the underlying record. My goal today  
9 really is to just make sure that I understand that history and  
10 understand your positions, so please don't take too much of my  
11 questions about which way I might be leaning on some of these  
12 issues.

13 I gather that a number of the pending motions are  
14 now moot, in whole or in part, because of some of the things  
15 you said in your responses, so I may ask just to confirm that  
16 at the end, but I'm going to focus today mostly on what is in  
17 dispute.

18 I plan to issue a written opinion on at least some  
19 of the issues here. I think some of them probably need a bit  
20 more consideration after argument and you would benefit from  
21 some more specific guidance. I know we're hitting up against  
22 the Thanksgiving holiday, so my plan and my hope is to get you  
23 a ruling hopefully next week and, if not, before the break so  
24 that you can plan your witnesses and evidence accordingly.

25 After we talk about these motions in limine, I want

1 to discuss some trial management issues, including scheduling  
2 and how I think we might work voir dire and the charges and  
3 that sort of thing. All right?

4 Will more than one counsel be arguing for each side  
5 today or is just one of you going to handle it, or does it  
6 depend on the motion and the issue?

7 MR. HARVIS: Yeah, we haven't decided that,  
8 Your Honor, if that's okay.

9 THE COURT: Yes.

10 MR. HARVIS: Great.

11 MR. THADANI: Your Honor, I believe, depending on  
12 which motion, different counsel will be speaking on the  
13 issues.

14 THE COURT: You're welcome to switch off. What I do  
15 is, I'll let you which motion I'm going to do. I'm going to  
16 take them a little bit out of order, and then you can just  
17 tell me who's doing it. And you can remain seated while  
18 you're arguing, just speak in the microphone so the court  
19 reporter can hear you.

20 And I will let her know that she is welcome to  
21 remind any of us, including me, to speak more slowly. It is a  
22 bad habit I picked up from all my years as a litigator that I  
23 am trying to break.

24 All right. So the first motion I wanted to ask you  
25 about is plaintiff's motion to allow some cross-examination

1 into an incident that led to an IAB investigation for one of  
2 the officer defendants.

3 Can you let me know how to pronounce his name? Is  
4 it Laliberte?

5 MR. THADANI: Laliberte, Your Honor.

6 THE COURT: Laliberte. Okay. Thank you.

7 Mr. Thadani, I understand your argument to be that  
8 this isn't proper impeachment of the Rule 608(b) because  
9 Sergeant Laliberte did not technically lie to the  
10 investigators in 2013 when he was asked about this incident  
11 regarding a time when he was caught on video punching a  
12 detainee; is that right?

13 MR. THADANI: Sort of, Your Honor. I don't believe  
14 the record is -- I mean, frankly, the record establishes, I  
15 believe based on the deposition testimony, that he didn't lie.  
16 I believe that plaintiff's counsel, as I indicated in the  
17 motion papers, is taking the -- the paperwork they're relying  
18 upon, I believe, is vague and not clear as to the fact that I  
19 believe what plaintiff's counsel is asserting is that what  
20 happened was, after this arrest, this incident that occurred,  
21 Sergeant Laliberte was questioned about it. He made denials  
22 about using any force, was shown a video recording showing  
23 that he had used force and then basically admitted/apologized  
24 for it.

25 I don't believe that that is clearly expressed in

1 the record that they're utilizing. There is no clear record  
2 that that is what happened. Sergeant Laliberte testified at  
3 his deposition that is not what happened. And so our  
4 assertion is that there -- and moreover, as we argue in the  
5 papers, there wasn't a finding, there wasn't charges brought.  
6 So, for instance, after that occurred, the NYPD could've  
7 brought charges for making a misstatement or a false statement  
8 during an interview, during an investigation. They didn't do  
9 that, that often happens. They didn't do that. And  
10 investigator substantiate that sort of allegation. And,  
11 therefore, our position is, there's no finding.

12 And also, the record doesn't assert that that is  
13 what occurred, that there was a false statement made. And we  
14 believe, especially given the nature of the underlying action,  
15 which is Sergeant Laliberte punching an individual, given that  
16 this is an excessive force case, sort of ties into a corollary  
17 argument with respect to Rule 403 and the unfair prejudice,  
18 that if it's presented the way I believe plaintiff's counsel  
19 intends to present it, which is highlighted I think by the  
20 fact that a video recording of the punch was listed on their  
21 exhibit list, which doesn't really speak to whether there was  
22 a false statement or not in the investigation, that that  
23 intention and the underlying incident itself then makes this  
24 evidence substantially more prejudicial than probative.

25 THE COURT: I haven't reviewed that part of his

1 deposition. But when you say he denied or disputed certain  
2 aspects of what plaintiff is contending, is he denying what  
3 was in the IAB report, that he was asked if he had -- and I'm  
4 quoting from an excerpt of it that was in the briefs --  
5 observed any members of service punch any of the partygoers,  
6 he stated no; when asked if any of the arrestees had any  
7 injuries or made any complaints against any member of service,  
8 he said no; after viewing the video footage that showed him  
9 punching, and then it's redacted, by a detainee in the face,  
10 Sergeant Laliberte stated that punching that individual was a  
11 bad decision, he made a mistake and is embarrassed by his  
12 actions.

13 As I understand it, he's not disputing that the  
14 sequence of what he was asked and what he was shown and what  
15 he answered in the IAB report is incorrect, or is he disputing  
16 that?

17 MR. THADANI: No, I don't believe he's disputing  
18 that. I don't recall specifically how precise the deposition  
19 questioning was. I don't think it was as specific as asking  
20 about that particular sequence of events. I believe the  
21 question was more broad as to did you deny using force during  
22 the course of that investigation, and he said no.

23 And I believe actually there was some sequential  
24 questioning with respect to chronology of events as in, like,  
25 when you were first asked what happened, did you deny it or

1 did you not state use force? And he said basically that he  
2 was up front and honest about what happened and felt  
3 remorseful about it. That's what I believe the questioning  
4 was. I don't have it in front of me either, Your Honor. I  
5 don't believe it was as precise though as denying specific  
6 portions that you just read.

7 THE COURT: But he's not disputing -- and I know  
8 there's a separate issue about whether the extrinsic evidence  
9 of punching could come in, but he's not disputing that he did,  
10 as the report says, punch a detainee in the face?

11 MR. THADANI: No. No.

12 THE COURT: Okay. And I understand as your  
13 argument, he was asked about whether he observed anyone else  
14 punch or injure an arrestee. And he said no. And your  
15 argument is, it's not really proper impeachment to say he lied  
16 because he wasn't directly asked, did you yourself punch or  
17 harm any cuffed arrestee.

18 MR. THADANI: That's our position. Frankly, it's a  
19 very straightforward issue. And frankly, if the sequencing  
20 occurred the way plaintiff's counsel asserts, the report could  
21 have very easily said that, that Sergeant Laliberte was asked  
22 whether he punched any individual, and he denied it, he was  
23 then shown the video, and he admitted it.

24 And then like I said earlier, Your Honor, in that  
25 scenario, internal affairs NYPD could've charged him for



1 making a false statement that he just admitted that he  
2 would've made in that scenario, and that didn't occur. And  
3 the report does not clearly state that. It's, in our view I  
4 guess, ambiguous and unclear as to specifically what he was  
5 asked and what he denied to with respect to his own actions,  
6 as opposed to actions he observed other people taking.

7 THE COURT: But it seems clear that the investigator  
8 who was asking these questions had the video at the time he  
9 asked him the questions, right? He was saying, tell me what  
10 happened, he gave an answer, and then he confronted him with  
11 the video, and then he gave an additional answer and  
12 apologized. It all happened within that sequence, right?

13 MR. THADANI: I mean, I don't -- I don't know. I  
14 don't know exactly. I mean, certainly by reading it, that  
15 would be the impression, that the investigator had the video  
16 at the time the questioning occurred. I think that is true.

17 THE COURT: So don't you think there's a fair  
18 argument that it's at least materially misleading for him?  
19 You know, he's being asked about what happened in this event,  
20 the investigator seems to be giving him a chance to tell his  
21 version of what happened. By leaving out this important fact,  
22 he obviously knew he wasn't supposed to be punching a cuffed  
23 arrestee, that he is, at the very least, intentionally  
24 misleading the investigator, and that that bears on his  
25 truthfulness for purposes of 608?

1 MR. THADANI: I believe that argument can be made,  
2 that perhaps -- again, I think it's unclear, the record is  
3 unclear as to what specific questions he was asked, either the  
4 investigator's notes as to what was -- you know, I don't know  
5 how long of an interview. Depending on the sequencing,  
6 certainly that argument could be made.

7 I think what we would add on with respect to that  
8 is, again, even to the extent this questioning were permitted  
9 by Your Honor, I believe that there is -- you know,  
10 plaintiff's counsel has stated in their briefing something to  
11 the effect of certain facts with respect to this need to be  
12 admitted and not really explaining what that means.

13 And I think given the underlying nature of the  
14 action and given what the issue is in this case, even to the  
15 extent Your Honor is inclined to admit evidence or testimony  
16 or questioning with respect to this, there's a way to do it  
17 without revealing, for instance, what plaintiff's counsel  
18 repeatedly states as sort of classifying this as a sucker  
19 punch, right?

20 For instance, there could be questioning to the  
21 effect of, you know, you were involved in an arrest on a  
22 certain date, you know, X number of months before this  
23 incident. And during that course of the arrest, you took  
24 certain actions. And following that arrest, you were asked  
25 questions about the actions you took. And you denied -- these

1 are just an example, questions they could ask. You denied  
2 taking a certain action. And you were shown a video recording  
3 showing what happened during that arrest, and then you  
4 admitted to that action, something to that effect, right?

5 And that's what plaintiff's counsel is getting at.  
6 That doesn't reveal, for instance, what I think is really the  
7 more troubling nature of this is, I believe it is a attempt to  
8 backdoor what would otherwise be improper character evidence  
9 and improper propensity evidence because it involves a use of  
10 force by --

11 THE COURT: And I understand that, that that's the  
12 argument. I guess the concern I have is that without being  
13 able to confront him with the specifics of the incident, the  
14 jury's understanding of why it bears on his truthfulness, that  
15 he only admitted something this serious when he knew there was  
16 a video, is lessened. And the plaintiff is entitled to the  
17 full benefit of evidence, not the video itself, but at least  
18 the circumstances under which it happened to show why this is  
19 a situation under which a truthful officer would be expected  
20 to be forthcoming.

21 So how do you address that?

22 MR. THADANI: I understand that, Your Honor. I  
23 think our feeling would be, this would raise the 403 argument  
24 again. Like, for us, that would be substantially that  
25 prejudic- -- that probative need for the jury to understand,

1 we believe, would be substantially -- would be outweighed,  
2 substantially outweighed by its prejudicial effect given the  
3 fact that this is a case in which some of four officers -- I  
4 know this is probably part of another motion, as Your Honor is  
5 aware, two out of four of the officers allegedly used  
6 excessive force. This may be one of them, I don't know. I  
7 guess maybe they'll tell us. But it -- presumably there's an  
8 excessive force allegation against him. Maybe if there  
9 wasn't, it'd be different.

10 But to the extent there is an excessive force  
11 allegation made against him specifically, and this is a case  
12 involving excessive force, this is the danger of the jury  
13 hearing then that he has, within a year, roughly a year prior  
14 to the incident, used excessive force against a handcuffed  
15 individual, which is the allegation in this case, I think  
16 argue would be there has to be compromise somewhere in the  
17 middle where that underlying facts are not necessary in order  
18 for the jury to assess credibility of this particular  
19 individual who is going to testify.

20 THE COURT: Can you see any version of those facts  
21 specifically? And I'm not asking you to necessarily decide  
22 what the testimony is going to be or exactly where the bounds  
23 are going to be, but somewhere between -- it could be any  
24 possible incident, which could be a traffic stop all the way  
25 to punching a cuffed arrestee. What do you think would be the

1 fair compromise in terms of allowing some questioning?

2 MR. THADANI: I mean, I don't think -- I mean, I  
3 have to think through it a little bit, but, you know, thinking  
4 through it now, I don't think it would be the nature of the  
5 force used for sure. I mean, it may be used force on an  
6 individual, perhaps. I mean, again, I still feel like given  
7 the nature of this case, there are real 403 concerns. I think  
8 with this kind of questioning, there's a way to have it be a  
9 little bit less -- like, for instance, the examples I gave,  
10 which I understand maybe is on one realm, I think would help  
11 remedy those issues a little bit more, but I understand  
12 Your Honor's point.

13 But I think perhaps if Your Honor, again, is  
14 inclined to permit this questioning and maybe something to the  
15 effect of use of force. But even that, you know, I hesitate  
16 to say it because I still think given the fact that's what the  
17 claim is in this case presumably against this individual,  
18 again, I think maybe the equation does change if there's no  
19 excessive force claim being brought against him. That may be  
20 a different analysis.

21 THE COURT: So I want to come back to that point  
22 about excessive force when we get to the issue of which  
23 defendants are alleged to have used it.

24 So let me ask plaintiff's counsel. What's your  
25 answer to the concern the City's raised about the video itself

1 in particular being; A, extrinsic evidence under 608 and the  
2 whole incident being impermissible propensity evidence?  
3 Because the case law says, the more similar it is to the  
4 allegations in question, the more skeptically and more  
5 carefully I have to view it before it's allowed in.

6 MR. HARVIS: Well, we agree it's a quite similar.  
7 So we certainly agree with that. We don't have any intention  
8 of offering the video in our case in chief unless there is  
9 some denials from the officer. So we were not planning on  
10 offering that as, you know, case in chief evidence.

11 But I guess I would just step back and start where  
12 Mr. Thadani did and talk about the context a little bit. So  
13 this individual was the sergeant, a supervisor, the desk  
14 officer of this precinct. So he's seated right across, about  
15 as far as I am from Your Honor, where Ms. Martinez was  
16 handcuffed in that room. And, you know, we know that a year  
17 earlier he had, you know, punched this person while they were  
18 handcuffed and never mentioned it until he was confronted  
19 about it.

20 So his job is to record what happens in the precinct  
21 during that night. And we know -- it's actually one of  
22 admissions that we got from them in discovery -- is that there  
23 was no notation. Sergeant Laliberte made no record at all  
24 about this. So, and then when he came in to testify after we  
25 got all the discovery that led Judge Pollak to recommend

1 terminating sanctions, we asked him what he remembered about  
2 that night as a desk officer. And his answer was zero.  
3 That's how much he remembers.

4 So, you know, we believe that on these facts we're  
5 entitled to have every opportunity to challenge his  
6 credibility and the validity of his claim that he actually  
7 doesn't remember anything because it's critical to understand  
8 why there was no record made of this event.

9 And so we think it all comes down to credibility.  
10 We think it's all wrapped up in concealment. And we think  
11 that many of the facts that underlie the prior incident are,  
12 in our view, highly probative, which really changes the  
13 equation in terms of, it has to be substantially outweighed by  
14 the prejudice, not just outweighed.

15 So the more probative it is, the more the prejudice  
16 would have to outweigh it in order for it to tip the scales.  
17 And we believe that the prejudice has to be not just  
18 prejudice, but undue prejudice. And in a case where someone  
19 happened to do something where revealing their untruthfulness  
20 happens to show that it's unlikely that they were truthful in  
21 this instance is precisely the outcome that the rules were  
22 intended to, you know, ensure.

23 THE COURT: And if I understand how you intend to  
24 present at this point, you're seeking only to ask him, when  
25 you call him -- obviously you've conceded that as a

1 defendant -- you can lead him on essentially your direct case  
2 leading about the questions and answers he was asked at the  
3 IAB and you don't intend to offer any extrinsic evidence  
4 unless he denies some fact that's refuted by the video in  
5 which case I guess we'll take that up, although my  
6 understanding is, that's probably barred as impermissible  
7 extrinsic evidence under 608 as well.

8 MR. HARVIS: I agree with everything Your Honor  
9 said, yes.

10 THE COURT: Are there any other records -- until you  
11 begin your argument, Mr. Thadani, I wasn't sure if there were  
12 other, statements, other records that relate to the specific  
13 questions and answers that he was asked during this 2013  
14 investigation other than the IAB report.

15 MR. THADANI: Not that I believe has been produced  
16 or disclosed between the parties.

17 THE COURT: Okay. And you searched for them  
18 yourself when you were attempting to investigate the  
19 circumstances of this?

20 MR. THADANI: Yes, Your Honor, there was. I don't  
21 remember all the specifics of the discovery dispute with  
22 respect to this, how much needed to be produced with respect  
23 to this particular investigation, but certainly we produced  
24 within the scope of what we were, you know, ordered to do so  
25 and while we -- what we agreed amongst the parties and I



1 believe under the supervision of Magistrate Judge Pollak.

2 One thing I do want to note. I don't know that it  
3 necessarily moves to the needle, but just to correct the  
4 record, plaintiff's counsel just stated something to the  
5 effect of Defendant Laliberte testified he had no recollection  
6 of this incident. That is true. He was deposed twice in this  
7 case. He was deposed as a nonparty initially, and he  
8 testified in that manner very early on during discovery. Then  
9 testified again.

10 THE COURT: Let me just clarify this incident. You  
11 mean the incident involving Ms. Martinez?

12 MR. THADANI: Yes. Sorry. My apologies,  
13 Your Honor. I should've clarified.

14 Yes, with respect to the incident underlying this  
15 particular lawsuit involving Ms. Martinez, he testified as a  
16 nonparty early on in discovery and at that point, when he  
17 wasn't a defendant, testified that he had no recollection of  
18 the incident. Yes, he did testify consistently then when he  
19 was named as a defendant and deposed again the same way.

20 I just wanted to clarify that for the record. I  
21 don't know that, like I said, necessarily changes the needle  
22 per se, but just so the record is clear.

23 THE COURT: I understand.

24 Okay. Let's move on to the next one.

25 Next I'd like to talk about plaintiff's motion to

1 preclude the headshot identifications and kind of relatedly to  
2 admit some evidence of the City's discovery violations and  
3 sanctions.

4 So let me start with the headshot evidence. I don't  
5 know which counsel for the City would like to address it.

6 MR. THADANI: I can handle it, Your Honor.

7 THE COURT: Sure.

8 So explain to me relatively concisely what sort of,  
9 quote/unquote, headshot evidence you seek to offer and how you  
10 see it coming in and explain to me why you think it's relevant  
11 to the claims that the jury is going to hear?

12 MR. THADANI: Sure.

13 So, as I think Your Honor is aware, we listed  
14 certain headshot photographs as exhibits. I believe it's all  
15 under one exhibit right now. It's II. I believe the  
16 intention would be to subpart that in among multiple exhibits.  
17 I think there is six photographs probably there. It's a  
18 portion of the photographs that the plaintiff reviewed early  
19 on in this case to identify what at the time were John Doe  
20 defendants.

21 So the case was brought. Plaintiff had already  
22 testified at what's called a 50-H hearing and gave a  
23 description of what the two individuals she claimed assaulted  
24 her looked like in terms of facial hair, body type, age,  
25 clothing, et cetera.

1           Early on in the case, plaintiff's counsel -- I was  
2 not a counsel to the case at the time, but I believe that  
3 ultimately there were photographs exchanged in two different  
4 parts. Some photographs were in a Civilian Complaint Review  
5 Board file. And other photographs -- maybe about six or so  
6 photographs in there. And then about 30 photographs, I  
7 believe headshot photographs, were produced unlabeled to the  
8 plaintiff's counsel in discovery with the intention that I  
9 think the idea I believe behind that was that those are the  
10 individuals that appeared on the role call as potentially  
11 present at the precinct during the relevant period where the  
12 plaintiff alleged that the use of force occurred.

13           THE COURT: Let me stop you for one second.

14           When you say relatively early in the case, do you  
15 know when it was that these photos were produced?

16           MR. THADANI: I think within the first three to  
17 six months. I mean, I don't know specifically.

18           THE COURT: Three to six months after the complaint  
19 was filed or after the CCRB --

20           MR. THADANI: I believe after the complaint was  
21 filed. And again, this is not a pro se case, but in pro se  
22 cases, this is a fairly typical scenario. The Valentin order  
23 is issued. John Doe defendants need to be identified by the  
24 City and also the Corporation Counsel. And sometimes that  
25 results in photographs being provided to the plaintiff to

1 identify somebody after descriptions are given of who did what  
2 and who are the proper defendants in this case.

3 So that occurred here. There were, I think, roughly  
4 36 photographs in total, give or take, that were provided to  
5 the plaintiff's counsel. There are letters on the docket that  
6 relate to that review with some of which we cited in our  
7 papers.

8 And ultimately plaintiff identified two individuals  
9 as who she's stated were the ones who assaulted her. Those  
10 are former defendants now, Forgione and Weitzman. They remain  
11 as defendants in the case on the excessive force claim all the  
12 way through all of discovery and our summary judgment motion.  
13 In fact, today, the complaint that's in this case still names  
14 Forgione and Weitzman as the individuals who used excessive  
15 force on her, even though they're no longer defendants in the  
16 case.

17 It was on summary judgment in opposition that  
18 plaintiff presented an affidavit that stated that Eric Ryan,  
19 who is one of the defendants, and one of either  
20 Joseph Digennaro, David Camhi or Keith Laliberte, who are the  
21 other defendants in the case, assaulted her.

22 The purpose for -- to get to your question, what  
23 we're sort of intending I think for trial is these photographs  
24 are relevant to credibility primarily. By plaintiff's  
25 counsel's admission, they listed two of these photographs as

1 their own exhibits and in the JPT0 stated that these  
2 photographs are relevant to credibility and personal  
3 involvement.

4 And the reason why is because -- it goes to  
5 credibility is because she had photographs of many individuals  
6 at the precinct, including the four defendants who are in the  
7 case now, and discounted them. She identified two individuals  
8 and not these other individuals, including the four defendants  
9 in the case now. The fact that that occurred, I think from  
10 our view, is clearly relevant to her credibility in terms of  
11 the events that she's saying occurred and who committed them.

12 THE COURT: When you say the photos are relevant to  
13 credibility, you want to cross-examine her on the fact that  
14 she received 36 photographs including the named defendants and  
15 did not select any of them as the individuals she believed  
16 were there, or that she had selected two who are no longer  
17 defendants in this case?

18 MR. THADANI: I mean I think our -- you know, I  
19 don't know for sure, but I think our intention would be to  
20 question about the process. So you were provided photo -- you  
21 gave descriptions, et cetera, you were provided with  
22 photographs, you reviewed those photographs and perhaps using  
23 some as exhibits to show her some of the photographs she  
24 reviewed, have her, I think, yes, establish that she  
25 identified two individuals, she didn't identify the four

1 individuals who are defendants in the case now.

2           You know, in terms of exactly the sequencing and  
3 questioning, you know, I'm not entirely sure, but I think  
4 ultimately it would be on a cross-examination, questioning her  
5 through the process of reviewing photographs and who she  
6 picked and who she didn't pick.

7           THE COURT: So let me ask you a little bit about  
8 your theory of relevancy because now I -- thank you, I  
9 understand the chronology of it better.

10           I think I would understand your point better if this  
11 were a misidentification case. You know, but in this case as  
12 I understand it, and correct me if I'm wrong, there's a real  
13 credibility issue for the jury to resolve in terms of what  
14 happened in the precinct because Ms. Martinez is saying she  
15 was physically assaulted by two of these officers and others  
16 failed to intervene or stood by in some way intentionally and  
17 egregiously.

18           And as I understand it, the City and the individuals  
19 are claiming that that didn't happen, that she essentially  
20 inflicted these injuries upon herself and then is falsely  
21 claiming now that it was done to her.

22           So if that's the case and there's no dispute that  
23 these four officers were in the station house and interacted  
24 with her in some way, which is why they're named defendants  
25 and why summary judgment wasn't granted against them, why is

1 her failure to identify the photos some months after the event  
2 relevant to her credibility about whether she's telling the  
3 truth or not?

4 MR. THADANI: Sure. I have several responses to  
5 that. First of all, we didn't actually move on excessive  
6 force, so there was no determination as to whether the --  
7 actually don't know that all of these individuals interacted  
8 with the plaintiff. I don't know that -- I don't think the  
9 evidence is necessarily going to bare that out. I think it's  
10 probably undisputed that three of them did. Whether defendant  
11 Laliberte --

12 THE COURT: Which three?

13 MR. THADANI: Ryan, who was the arresting officer,  
14 Digennaro and Camhi. You know, I don't know what the evidence  
15 is exactly.

16 THE COURT: Let me ask about the fourth while we're  
17 on this real quick.

18 MR. THADANI: Sure.

19 THE COURT: And then Laliberte, there's no dispute  
20 that he was seated at the desk, as plaintiff's counsel said,  
21 you know, within view of the room, right?

22 MR. THADANI: He was a desk officer. He was seated  
23 there. Whether or not he was there at the time depending on  
24 which version of events you go with, that I can't -- you know,  
25 I don't know what the evidence will bare on that. But with

1 respect to the fact that he was a desk officer at the time,  
2 yes, he was.

3 THE COURT: And "at the time" meaning in the  
4 precinct on the night that she was in custody during the hours  
5 she was there?

6 MR. THADANI: Yes, that's correct.

7 THE COURT: Thank you.

8 MR. THADANI: I think, again, our -- I didn't read  
9 plaintiff's counsel as -- their opposition as indicating this  
10 wasn't relevant so much as it opens the door to other  
11 information, which I just have a response with respect to that  
12 as well.

13 With respect to Your Honor's question as to  
14 relevance and credibility, yes, this is ultimately a question  
15 about did X happen or did Y happen. But the fact that, given  
16 our contention is that this did not occur, any details that  
17 she gives that are inconsistent that indicate an inability to  
18 identify the alleged -- I mean, she's in a room by herself,  
19 it's well lit, no one's wearing a mask, this is pre-COVID, one  
20 would think that she would remember these people's faces.

21 And the fact that she identified different  
22 individuals as the ones who assailed her -- and again, this is  
23 not like 30 seconds. She's alleging this goes on for ten, 15  
24 plus minutes. Okay? And she's bringing this lawsuit to  
25 testify about it. The fact that she doesn't identify these



1 individuals -- in fact, there are statements on the record, on  
2 the docket from the plaintiff's attorneys, that says we've  
3 ruled out these people as even being involved.

4           Now, two of those people are defendants today.  
5 Okay? And the fact that they listed these photographs and  
6 indicated it's relevant to personal involvement, which is  
7 still an issue as we've raised already, there's four  
8 defendants on a claim involving two people, and to her  
9 credibility, they've conceded that much. And again, I think  
10 it's -- it clearly bears on her credibility generally that she  
11 saw photographs, identified two other people, did not -- most  
12 importantly that she didn't identify these people. She saw  
13 their photographs.

14           And to the extent plaintiff's counsel argues  
15 authenticity or the photographs don't look like them, that's a  
16 weight argument. The jury can see the individuals who are  
17 sitting in the courtroom and the photographs and can make an  
18 assessment on their own, do these photographs look similar?  
19 Do person A and B who are dismissed look like person C, D, E  
20 and F or not?

21           But that to -- our view is that it's clearly  
22 relevant to her credibility, even if it's not the ultimate  
23 issue, which is, you know, did X occur, did Y occur? Any  
24 statement she gives with respect to the incident bears on her  
25 credibility as to whether it occurred, especially when we're

1 saying it didn't happen at all.

2 THE COURT: Okay. I think I understand your  
3 position.

4 Let me ask counsel for plaintiff, is the City  
5 correct that you're not opposing admission of the photos on  
6 relevancy grounds, and that your argument is that if they are  
7 used to cross-examine her, that the jury should also hear  
8 evidence of the City's discovery violations because the delay  
9 is, in some part, responsible for her failure to identify them  
10 or might be responsible?

11 MR. HARVIS: No. I think we're arguing part of  
12 that. But I think that we -- I think that we think that  
13 they're irrelevant to her credibility.

14 THE COURT: Irrelevant?

15 MR. HARVIS: Yes, irrelevant.

16 And the reason why we think that is because, well, a  
17 couple of things. One is, there are procedures that parties  
18 use during discovery if they want to record someone's response  
19 to photographs. You know, you can -- at a deposition, you can  
20 bring out the photographs, you can say, hey, will you look at  
21 these and tell me what you think. You know, and is this the  
22 person, is this not the person? There was no procedure of any  
23 kind even remotely resembling that. They never asked her  
24 about the photographs. They deposed her twice, never asked  
25 her a single question, never served a discovery demand that

1 required her to respond to these.

2           What they're doing is, they're taking her attorney's  
3 statements that were put on the record as part of a good faith  
4 process to narrow down who should be in this case and, you  
5 know, treating those as if they're statements out of the mouth  
6 of Rosie Martinez in a session where everyone understood what  
7 was being asked and what was going on. I mean, for all --  
8 this record, it might -- she may very well have identified  
9 them and counsel thought there was some strategic reason to  
10 describe it in another way.

11           I mean, I'm just saying there's a lot of layers  
12 between her review of the photographs and the information that  
13 would provide a good faith basis for them to question her  
14 about it to begin with.

15           And then if I --

16           THE COURT: And let me just ask you real quick.

17           MR. HARVIS: Yeah.

18           THE COURT: Was there ever any array -- and either  
19 counsel address this. Did Captain Hanrahan or anyone else  
20 during the IAB investigation show her any photographs? And if  
21 not, does anyone know why not?

22           MR. HARVIS: I will let defense counsel answer that.

23           MR. THADANI: No. I mean, the investigation, it  
24 wasn't an internal affairs investigation per se. It was a  
25 command-level investigation. And the reason it was a

1 triggered was because there was a prisoner injured in custody  
2 and it was triggered by the fact that plaintiff's counsel at  
3 central booking requested medical attention, was sent to the  
4 hospital with respect to that.

5 THE COURT: So why weren't -- is -- are photos not  
6 typically shown as part of that process to see if they can  
7 identify who the individuals were that allegedly caused the  
8 injuries?

9 MR. THADANI: It does happen. It does happen. The  
10 investigation documents that we have indicate that plaintiff  
11 denied wrongdoing by members of service and, therefore, that  
12 process was not undertaken. And the documentation reflects  
13 the observations of two of the defendants in the case, Ryan  
14 and Camhi with respect to her punching a wall and kicking at a  
15 cabinet and needing to be restrained as a result. So it  
16 didn't get to the point where there was identification  
17 procedures.

18 THE COURT: And as I understand it -- I don't want  
19 to get into the -- into all the issues around the handwritten  
20 report just yet, but I think my understanding is that  
21 plaintiff is denying that that interview ever took place.  
22 She's claiming she was never interviewed, and of course  
23 Captain Hanrahan is not here to answer that question himself  
24 or give his version of what he did during the investigation.

25 MR. THADANI: That is accurate on both accounts.

1 THE COURT: But as far as we know, nobody during the  
2 command -- it's called command-level investigation?

3 MR. THADANI: Yes.

4 THE COURT: Ever showed her any photographs of any  
5 of the individuals?

6 MR. THADANI: Not that I'm ware of.

7 One thing I will say, Your Honor, with respect to  
8 the questions about deposition. So I was not counsel at the  
9 first deposition. However, at that point, Forgione and  
10 Weitzman were substituted as defendants for the John Doe  
11 defendants, and there was no -- there was no questioning on  
12 the photographs. That is true. With respect to the second  
13 deposition, there could have been and would have been  
14 questioning. And there is a record of that.

15 So first of all, that deposition was very limited in  
16 scope, partially because of plaintiff's counsel and my  
17 negotiation with respect to certain topics that would be  
18 raised and moreover because the magistrate judge's view with  
19 respect to the proper scope of that deposition.

20 THE COURT: And that was because it was necessitated  
21 by all the late disclosures after that?

22 MR. THADANI: Partially. I mean, really I think  
23 what the precipitous for primarily the second deposition was,  
24 was a change in claims and damages that were being alleged in  
25 the case. There were several more claims being added. There

1 was a different set of damages being asserted. There was a  
2 lot more medical treatment being asserted, et cetera.

3 So generally the deposition was limited in scope  
4 with respect to new claims and damages either newly being  
5 asserted or being asserted since the last deposition, so  
6 really like a change in circumstances.

7 Plaintiff's counsel has represented several times in  
8 attempt to amend the complaint to clarify who she was alleging  
9 the excessive force claim was against. That never happened.  
10 Still hasn't happened.

11 Before the deposition, I sent plaintiff's counsel an  
12 e-mail, it was on March 18th, 2019, and stated that -- and  
13 this was almost a year before the deposition actually took  
14 place, the plaintiff's deposition, you know, we talked about  
15 what were the topic areas that were appropriate for that  
16 deposition.

17 And I state in that e-mail that we had talked -- it  
18 was reflecting a phone conversation that we had, that we  
19 talked about that if the plaintiff makes any amendments to the  
20 complaint, that we would question about those amendments. And  
21 the idea behind that was exactly this. Had plaintiff amended  
22 the complaint to name different defendants on the excessive  
23 force claim, I would have asked and shown those photographs  
24 and asked these questions.

25 Moreover, at the end of that deposition, and it's on

1 the transcript, I reserved the right to continue the  
2 deposition in the event that plaintiff amends the complaint to  
3 change her allegations with respect to that claim. That also  
4 still has not happened. So I just want to just address that  
5 because seems to be like a big point here.

6 THE COURT: And did you ever go back to the  
7 magistrate and request a third deposition after --

8 MR. THADANI: At that point, no, because discovery  
9 had -- by the time they changed their view, which again still  
10 hasn't fully been cemented, discovery is long closed, we're in  
11 motion for summary judgment practice. And so no, that did not  
12 happen.

13 THE COURT: Understood.

14 I think before we got into that issue, you were  
15 going to address the threshold question about the relevancy  
16 and admissibility of the headshot identification.

17 MR. HARVIS: Thank you. I'll try to do that very  
18 briefly.

19 So yes, I'm glad that the Hanrahan report and the  
20 IAB and CCRB investigation is now something that we've all  
21 discussed, because when we were dealing with all of this, when  
22 we were -- when plaintiff, who by the way -- you know, we talk  
23 about her giving a 50-H and having these depositions, I mean,  
24 she has repeatedly described the officers who assaulted her.  
25 She's done it consistently in detail, and it was on the basis,

1 on the strength of her identification that we had tried this  
2 process in good faith to get these photographs.

3 And the reason why that was necessary is because  
4 there was a really severe coordinated deception and  
5 concealment going on where when we were negotiating with them  
6 about the photographs and trying to work with Judge Pollak to  
7 get the disclosures that we needed, we didn't know about the  
8 Hanrahan report, we didn't know that this guy, Lieutenant  
9 Camhi, had called internal affairs and called in that a woman  
10 had been injuring herself, we didn't know that documents in  
11 the Hanrahan report would indicate that both Ryan and Camhi  
12 had restrained Ms. Martinez.

13 If we had known all of that, we would've obviously  
14 looked at the photographs in a different light than -- and  
15 this is really what we're getting at with the question of, you  
16 know, what is the jury going to be learn about this, because  
17 there's -- there's -- the reason why terminating sanctions  
18 were recommended in this case is because I believe Judge  
19 Pollak described it as, you know, the worst instance of people  
20 chasing their tails without the right information that she'd  
21 ever seen in her career.

22 And so, you know, we think that the idea of taking  
23 two separate productions where in a very choreographed process  
24 where we were trying to get to the truth but we had none of  
25 the information that we should've had, and then subselect from



1 those 36 photographs this piecemeal exhibit of six  
2 photographs, we don't know when they were taken, we have no  
3 idea if they resemble these people or if they resemble them on  
4 the night of January 23rd, 2015. And there were plenty of  
5 opportunities to take discovery on that, to sort that out, to  
6 get information on that. None of that was done.

7 And the idea that now, you know, Ms. Martinez is  
8 going to be presented with this evidence and that the  
9 arguments are going to be made in a vacuum about how crazy it  
10 is that she couldn't pick these people out, we think it's  
11 misleading to the jury, we think it's not probative in the  
12 least, and we think it's highly prejudicial, and we think 403  
13 should exclude the evidence.

14 THE COURT: So if I were to allow the defendants to  
15 ask her a limited series of questions about, you know, was she  
16 provided photographs or confirming that she was provided  
17 certain photographs at a certain time and she can answer  
18 truthfully and to the best of her ability, you know, whether  
19 she recognized them or was able to identify them and why and  
20 you can certainly ask follow-up questions when you examine  
21 her, what, if anything, would you have the jury be told about  
22 that history and how would you have it come in without this  
23 turning into an unwarranted mini trial about discovery  
24 violations that the jury will not understand and would risk  
25 making a mess of things?

1 MR. HARVIS: I think what we would want to say is  
2 something like early in this case around the same time that  
3 these photographs were produced to Ms. Martinez's counsel, a  
4 judge in this court determined that they had violated 14 court  
5 orders in connection with the provision of information that  
6 was needed to identify them and recommended that the case be  
7 dismissed without a trial. And while that order wasn't  
8 ultimately adopted, that was a recommendation of a judge of  
9 this court regarding their conduct in the events surrounding  
10 these photographs.

11 And also, you know, you should know that  
12 Ms. Martinez herself, there's no record that she ever even saw  
13 all these photographs or what the circumstances were. I mean,  
14 that's my concern, is that they really lack a good faith basis  
15 to how do they decide whether she's being honest or not when  
16 she responds to these questions. They weren't there when she  
17 showed -- was showed the photographs. She's speaking, you  
18 know what I'm saying, through an attorney writing a letter to  
19 the Court.

20 And so I just think, she may say -- they may say,  
21 well, did you ever receive these photographs? And she could  
22 truthfully say no. Did you ever go to your attorney's office?  
23 And now we're in the realm of attorney-client communication  
24 and what happened in our office with me and Ms. Fett and  
25 Rosie Martinez. And they're allowed to cross her and suggest

1 that her answers are -- she's lying and now they're going to  
2 cross her with letters that her attorneys wrote. I just think  
3 the whole thing -- there's a reason why it's a much easier  
4 path to just say that that's not an appropriate area of  
5 cross-examination on this record and we don't need to talk  
6 about the sanctions. That's kind of how we're seeing it land.

7 THE COURT: Mr. Thadani, briefly, what's your  
8 response to the concern Mr. Harvis raises about  
9 attorney-client privilege and communications with her  
10 attorneys given that the only evidence you have -- I wasn't  
11 aware that there was no formal photo array or that she wasn't  
12 asked about in her depositions, but given that the only -- if  
13 she says I haven't seen these photographs, your only option is  
14 to cross-examine her on statements she made to her attorneys.

15 MR. THADANI: Yes. I have responses to the other  
16 points, but I'll address your question first.

17 So my response is, first of all, we don't believe  
18 this is an attorney-client issue. There's letters on the  
19 docket filed by the plaintiff's attorneys, and again, I  
20 believe those statements are imputed to plaintiff, that  
21 describe what occurred. So if there was a privilege, it's  
22 waived because it states that she reviewed these photographs.  
23 There's two, I believe at least two letters, one of which  
24 indicates she has reviewed photographs in the CCRB file, and  
25 these are not the folks who she alleges assaulted her.

1 There's one statement like that.

2 And then there's also then I think more than one  
3 letter that indicates the review of the remaining photographs  
4 and indicating that the parties were in an attempt to identify  
5 the proper John Doe defendants and these defendants, that  
6 process is over, and we're amending the complaint to name  
7 these two individuals.

8 So, first of all, to the extent there's an  
9 attorney-client issue, I don't believe that there is because,  
10 again, it's been waived and it's on the docket and those  
11 are -- even though they're through counsel, there are  
12 plaintiff's statements through counsel as what occurred, that  
13 she did review them.

14 And that's how we got where we got. We would not  
15 have had -- like, how else did these two defendants get into  
16 the case, Forgione and Weitzman? She did not have -- their  
17 name isn't in any other paperwork as reflecting involvement in  
18 the case. And it's clear on the docket that she reviewed  
19 photographs. Then we provided the names of those two  
20 individuals that she identified. And then those individuals  
21 were named in the complaint as the defendants in the case.

22 THE COURT: Let me just stop you right there.

23 Are you disputing, Mr. Harvis, that she did at some  
24 point identify Forgione -- and who was the other defendant?

25 MR. THADANI: Weitzman.

1 MR. HARVIS: Yes. Based on the information we had  
2 at that time -- and these people are similar looking to the  
3 descriptions that she provided, and so no, we're not denying  
4 that. But the City is the one making the motion that nothing  
5 related to dismiss claims can be discussed at the trial, but  
6 now we're going to be informing the jury of who all the prior  
7 defendants were and how -- what the process was of amending  
8 the complaint.

9 I mean, I understand -- I don't think that should be  
10 done, but I can't imagine how that could be done without us  
11 going through why all of that was necessary, which I don't  
12 think is evidence that they want to have come in at the trial.

13 MR. THADANI: May I address that.

14 So, first of all, I don't think our intent is to get  
15 into amending complaints. It's more about who she identified  
16 as opposed to complaints were amended or not, who were named  
17 as defendants. I don't think we need to get into that level.

18 THE COURT: I'm sorry. So you do plan to ask her  
19 about naming defendants?

20 MR. THADANI: No. No. No, not intending.

21 THE COURT: So just simply the fact of the  
22 identification of two officers who are not defendants in this  
23 case --

24 MR. THADANI: I think it's as simple as, you review  
25 photographs, and then showing her the two photographs of the

1 people she identified confirming those are the people she  
2 identified, showing her the other four photographs of the  
3 defendants; now you reviewed these photographs, you didn't  
4 identify them. Essentially like long and short.

5           With respect to the reference to sanctions and all  
6 that, I think what I'd say is, first of all, it's unclear to  
7 me why plaintiff's counsel can't simply say we didn't have  
8 documentation at the time. Like, for instance, if we ask  
9 those questions on a redirect examination, why they can't  
10 elicit the lack of certain documentation that they think is  
11 important that would've affected that identification process  
12 without raising sanctions and recommendations by a magistrate  
13 judge that were not adopted. And again, that would lead to a  
14 mini trial with respect to the sanctions whether they're  
15 appropriate or not.

16           Moreover --

17           THE COURT: And I see your point about the  
18 recommendations that weren't adopted, but the part of Judge  
19 Pollak's R and R as to liability and as to the violations was  
20 adopted and followed by Judge Donnelly and, again, referenced  
21 and adopted followed by Judge Kovner in her summary judgment  
22 decision when she declined to disturb the sanctions  
23 recommendation but did adopt the liability portion.

24           So, you know, I see plaintiff's request as coming in  
25 two parts. They may want both of those, but potentially I

1 could see a middle ground in which -- and I'm not saying this  
2 is what we're going to do, but in which the jury is told that  
3 there were these 14 discovery violations and that the photos  
4 of your clients currently were not produced or that the names  
5 of them and that the records identifying them were not  
6 produced until after those violations came to light, but is  
7 not told what recommendations were from a magistrate that  
8 ultimately weren't adopted by the district judge.

9 MR. THADANI: Judge, a couple of points. I'm not  
10 sure what Your Honor means by the liability recommendation was  
11 adopted.

12 THE COURT: Sorry. The aspect of the R and R,  
13 there's a portion in Judge Donnelly's decision where she says  
14 I'm adopting this portion of Magistrate Judge Pollak's  
15 decision in full as to -- and I apologize if it wasn't the  
16 word liability, but something along the lines as to the fault  
17 or the violations themselves.

18 MR. THADANI: Sure.

19 THE COURT: Finding as fact that those were willful  
20 and intentional violations. And again, the number of them,  
21 14, whether that comes in or not is, you know, something I'd  
22 want to consider.

23 But what's your response to the argument that at the  
24 very least if the jury is going to hear about the photographs  
25 and the sequence, that the failure to reveal all of the

1 documentation, you know, that proves what is essentially  
2 undisputed, which is the defendants' presence there  
3 restraining her, all of that, shouldn't be told to avoid  
4 confusion?

5 MR. THADANI: So I think it goes to just the fact  
6 that these are photographs of people. Okay? So in a criminal  
7 case if you're identifying who robbed you and you're looking  
8 at photographs, you can identify the person who robbed you.  
9 You don't also then need to see the surveillance video, their  
10 criminal history, everything about their -- all the evidence  
11 in the case. You don't need that to look at photographs. I'm  
12 looking at you, Your Honor, right now for the first time in  
13 person. If I see a photograph tomorrow, I'll say, oh, that's  
14 Judge Morrison, I remember her. I don't need to see anything  
15 else to do that.

16 So, first of all, they're photographs -- I believe  
17 plaintiff's counsel is using this as a way to get into  
18 evidence something that should not be in evidence. They  
19 haven't really explained, okay, we got this paperwork later,  
20 how did that affect the identification of looking at  
21 photographs and identifying who you allege did something to  
22 you? It doesn't. And again, the way -- if they want to  
23 remedy that by indicating that they didn't get certain  
24 documentation at that time, you didn't have the Hanrahan  
25 report, you didn't have the memo books, you didn't have this,



1 you didn't have that, they could do that. And that's a way  
2 to -- if they believe that's a proper argument to make with  
3 respect to the photograph identification, why it may not be as  
4 foolproof as it otherwise may have been, they can do that  
5 without raising the issue of sanctions being raised.

6 And again, I did raise this in the papers. The  
7 sanctions are against one of the five defendants that are  
8 remaining in the case. The City of New York, yes, is a  
9 defendant in the case. Obviously Your Honor is aware we have  
10 a motion in limine with respect to that issue. But without  
11 getting into that specific issue, the four individual  
12 defendants were not defendants in the case at the time. The  
13 sanctions were not asserted against them.

14 For the jury to hear that sanctions were being  
15 asserted in a trial that they're defendants in is unfairly  
16 prejudicial to them because they weren't involved, they  
17 weren't parties to that. And so that's another reason why  
18 reference of the sanctions -- first of all, it's unnecessary,  
19 because, again, they are photographs. This is not an  
20 allegation that we provided false photographs and then gave  
21 them the real photographs or we gave them photographs of when  
22 they were babies and then we gave them photographs of when  
23 they were adults. They're the same photographs. No new  
24 photographs came to light.

25 So again, I know plaintiff is raising this issue as

1 a conclusory, well, we didn't get the stuff, it's sanction  
2 discovery misconduct, but how -- how did the viewing of  
3 photographs, how would it be different if we had more  
4 information. That frankly goes to her credibility. If we had  
5 known that Camhi was involved, we wouldn't have picked Camhi.  
6 That does go to her credibility. She's just picking the  
7 person who she can most clearly say was involved versus the  
8 person who actually did it. That's sort of the issue here.

9 THE COURT: Thank you. I think I understand your  
10 argument.

11 Let me just go back really quickly to Captain  
12 Hanrahan's investigation.

13 What's your position on what time or do you have any  
14 information about when his investigation actually began? Was  
15 it the same day as her arrest or the day she was taken to the  
16 hospital? Was it shortly thereafter?

17 MR. THADANI: I believe it was within 12 hours of  
18 when she was taken to the hospital.

19 THE COURT: Okay. And as I understand it, your  
20 argument for the reason why the date on the report, the  
21 incorrect date, which is six days before her arrest, is listed  
22 is because he was using a template from another case, an  
23 electronic template that he essentially pulled up on the  
24 screen and filled out, and that's why we see not just the same  
25 date, but also the same case number as the case that's not

1 about Ms. Martinez; is that right?

2 MR. THADANI: Correct.

3 THE COURT: Okay. But as far as we know, there is  
4 no evidence that he showed Ms. Martinez any photographs of any  
5 of the officers who were at the precinct that night at all?

6 MR. THADANI: No.

7 THE COURT: Okay. And we don't know why he didn't  
8 do that other than if she was interviewed, she may have denied  
9 that any officer caused her harm?

10 MR. THADANI: I mean, it would require a fair amount  
11 of speculation. But if I'm permitted to speculate, I would  
12 state that, yes, I mean, based on the report that's there, it  
13 says that she denied wrongdoing by members of service.  
14 Understanding that's not what she's alleging in this lawsuit,  
15 I understand that, but that's what the document indicates.

16 Now, in an alternate universe where instead what it  
17 reflected was she identified wrongdoing and I don't know who  
18 it was, there may have been a photo array procedure done.  
19 That's done sometimes. I can't say for sure it would've been  
20 done. I don't know. But it may have been. So if I'm  
21 speculating as to why it didn't happen though, I think it's  
22 because the report does not indicate that plaintiff was  
23 asserting wrongdoing and couldn't identify who did it. It was  
24 more that she denied it and that's the reason.

25 THE COURT: Right. Although, in some ways, isn't

1 that -- and I recognize with all your caveats that we are  
2 speculating because he's not here one would certainly think  
3 that an official investigation, just like he would document  
4 who he interviews, he would document if he showed her  
5 photographs.

6 And in some ways I think your last answer got back  
7 to my original concern, which is, if the question in this case  
8 really was the identities of the officers and her ability to  
9 perceive and recall their faces, that would've been something  
10 he would have looked into very early on as opposed to the  
11 issue which we're dealing with today, which is really the same  
12 issue he began to investigate, which is, were her undisputed  
13 injuries caused by some improper use of force, failure to  
14 provide her with timely medical care and/or failure to  
15 intervene or not and who's telling the truth, not who's  
16 accurately remembering faces?

17 MR. THADANI: I understand that, Your Honor.  
18 However, again, just to reiterate the point we made is, I'm  
19 not saying that is the central issue in the case. It is not  
20 the central issue. Frankly, it is still an issue in the case  
21 because, again, plaintiff still hasn't identified who it is.  
22 But I don't think it's the central issue in the case.

23 The central issue in the case is, which version of  
24 two different events really wins the day? But again, like, I  
25 think the fact that she's alleging this happened to her, the

1 circumstances under which it happened to her, there's no  
2 masks, we're in a room with two people by myself, it's well  
3 lit, this is a traumatic, it's very serious allegations, my  
4 fingers are bent backwards, I'm put in chokehold, my feet are  
5 stepped on, my hair is pulled. The fact that she then  
6 describes them, what they look like, that's undisputed, I  
7 don't see any way that's not coming in, and looked at  
8 photographs, you know, understanding it's not immediately  
9 thereafter, but looked at photographs of individuals who were  
10 there at the precinct and identified certain people and, more  
11 importantly, precluded the people who are on the case now, it  
12 still speaks to her credibility just like, for instance,  
13 Laliberte allegedly, 13 months before this incident, may have  
14 given a false statement. It was unclear, but may have, by  
15 plaintiff's version of events, given a false statement with  
16 respect to an unrelated event, that goes to credibility.

17 This goes to credibility because it speaks  
18 specifically to her recollection of the events, what she is  
19 stating about the events and where this is really a  
20 credibility case about event A versus event B, it's a crucial  
21 part in assessing her credibility. And again, plaintiff's --  
22 we didn't tell them to do this. In the JPT0, they listed two  
23 of the photographs and wrote by themselves -- we didn't tell  
24 them to do it. They wrote relevant to credibility. They  
25 wrote relevant to personal involvement. They did that.

1 THE COURT: I think I understand that as talking  
2 about the defendants' credibility, or are you saying that the  
3 photos are relevant to her credibility?

4 MR. HARVIS: No, Your Honor, we're talking about the  
5 defendants' credibility.

6 MR. THADANI: Their photographs are relevant to  
7 their credibility?

8 THE COURT: Let me ask this because Mr. Thadani  
9 raises a good point.

10 What, if anything, do you intend to offer with  
11 respect to photographic evidence if I grant your motion to  
12 preclude Ms. Martinez from being questioned about photos -- a  
13 full array of 36 photos that you would get in discovery?

14 MR. HARVIS: Yeah. We would have no -- as far as  
15 I'm concerned, I don't think we would have any use for any of  
16 the photographs if we did that. And again, I just want to  
17 say, I mean, you know, it's not like in every case it's some  
18 part of a preliminary process where the plaintiff is presented  
19 with photographs.

20 I mean what Judge Pollak was attempting to do was  
21 have Corporation Counsel identify these people. And the only  
22 reason that the photographs even entered the case was because  
23 they professed to the Court that they couldn't do that because  
24 there was no incident. Because the individual officers,  
25 whether they were defendants or not, concealed their

1 involvement. Officer Ryan, who was the arresting officer,  
2 went to CCRB and was asked, you know, 45 minutes of questions  
3 about what happened that night, and he never made one mention  
4 of Rosie Martinez. And he allegedly went into a room and  
5 she's punching a wall. And so that's the record that we had.

6 We had a record of him denying, you know, omitting  
7 that anything happened. None of the documents that would've  
8 showed us who did it, there wouldn't have been any photographs  
9 in this case if they had just done the investigation that the  
10 Court ordered them to do. And so as a result of them not  
11 doing that, they then created this situation where  
12 manufacturing and using and through invading attorney-client  
13 interactions and attempting to kind of read the tea leaves of  
14 what we wrote on pages in the docket, they're now going to  
15 cross-examine it on her and the jury's not going to hear the  
16 context in which that was going on. We think that that's  
17 really prejudicial and misleading, and so that's -- that's  
18 really what it comes down to.

19 MR. THADANI: Your Honor, if you don't mind, just  
20 because I have the JPT0 in front of me, I just make a record  
21 here. On pages 20 and 21 on the JPT0, which is Docket 201,  
22 this is with respect to Exhibits 23 and 25, they wrote, quote,  
23 on Exhibit 23, Ryan's appearance -- and this is -- they listed  
24 his photograph, Ryan's appearance is relevant to personal  
25 involvement and plaintiff's credibility.

1           With respect to Exhibit 25 -- this was Digennaro's  
2 photograph -- defendants' appearance is relevant to personal  
3 involvement and plaintiff's credibility.

4           I just wanted to note that on --

5           MR. HARVIS: And they do both match the description  
6 that Ms. Martinez provided from the beginning. So I don't  
7 think that it doesn't -- I think that it supports her  
8 credibility to the extent that it's appropriate to admit it,  
9 but we think that it's going to go down a very misleading and  
10 problematic path for us to admit it.

11           THE COURT: Before we move on, because we have a lot  
12 to cover, let me ask the parties to just supplement if you can  
13 jointly -- and I hope this will be simpler than having you  
14 each do it. I'd just like to get a little more information as  
15 to the timing and the manner of when all of these  
16 36 photographs were provided to the plaintiff through her  
17 counsel. And the timing of any response that the City submits  
18 is relevant, you're welcome to add, you know, anything you  
19 think. I just want to get a sense of the time that elapsed.

20           And to the extent -- I don't think you have it, but  
21 you have any additional information about when Captain  
22 Hanrahan's investigation began and ended. If not, you can  
23 just rely on the representations you made here today. I know  
24 we're trying to recreate something with a deceased witness and  
25 an incomplete file.



1           MR. THADANI: Just to clarify, because I'm not sure  
2 if I heard correctly. Did you want us to submit a joint  
3 letter with respect to the timeline?

4           THE COURT: Sure. Why don't you submit the letter  
5 as a proponent of the photographs.

6           MR. THADANI: Okay.

7           THE COURT: But please confer with your adversary to  
8 the extent Mr. Harvis and Ms. Fett any differing statements or  
9 accounts as to when those were provided to you.

10          MR. THADANI: I believe the docket is pretty clear.  
11 I mean I think I can do that just based on citing to the  
12 docket. If I have questions, I'll certainly reach out to  
13 plaintiff's counsel.

14          THE COURT: Thank you.

15          Let me just ask before we move on, Mr. Harvis, to  
16 respond briefly to the City's argument that there's some  
17 manifest unfairness in having the individual officers bear the  
18 brunt of any taint from the sanctions history in discovery  
19 violations since they were not individual defendants in the  
20 case with the understanding the City is still a defendant and  
21 that's a separate issue.

22          MR. HARVIS: Right. I mean I think it's a valid  
23 concern to keep in mind that although, for example, Ryan  
24 conceal his involvement and we do believe that that was  
25 directly proximately caused part of what happened, we think

1 that that could be dealt with through a jury instruction just  
2 saying that, you know, the individual defendants were not part  
3 of the case at that -- I don't think we should be getting into  
4 any of this, frankly. I think it's really confusing for the  
5 jury. But I think if we had to deal with it, we would say  
6 that the individual defendants were not a part of the case at  
7 that time, and the City of New York, you know, is the one that  
8 was responsible for complying with the Court's order,  
9 something like that.

10 THE COURT: Right. Okay. Thanks.

11 Speaking of jury instructions, I wanted to ask you  
12 now about plaintiff's motion for an adverse inference  
13 instruction to the jury about the prisoner pedigree form and  
14 the prisoner holding pen roster.

15 So I've reviewed your briefs and the relevant  
16 authorities and I know that the undisputed legal standard  
17 here, which I don't think either side disputes, is that the  
18 Court can grant an adverse inference for spoliation if and  
19 only if, first, the party who had control over the evidence  
20 had a duty to preserve it at the time it was destroyed,  
21 second, the evidence was destroyed with a culpable state of  
22 mind and, three, a reasonable trier of fact could find that  
23 the evidence would have supported the movant's case.

24 I'm also aware with respect to the second prong, the  
25 culpable state of mind, there is some authority in this

1 circuit that was cited by Judge Kovner in her Lekomstev,  
2 L-E-K-O-M-S-T-E-V, decision that this state of mind can in  
3 some cases be established by evidence of negligence.

4           So here's my question for the City. My concern I  
5 have here is that the City, you know, as you pointed out when  
6 you were discussing the Hanrahan report, was I noticed very,  
7 very early on because there was a prisoner injured in custody,  
8 that this was an incident being investigated that there could  
9 well be a notice of claim filed, some civil liability  
10 resulting at the very least against the City even if they  
11 hadn't identified the officers at that juncture.

12           And so, you know, by your account, the investigation  
13 obviously didn't start six days before she was arrested, but  
14 started very soon after. And I realize at this point you  
15 can't fix the exact date, but certainly very soon. So why  
16 wasn't that investigation enough to trigger a real duty on the  
17 NYPD's part, the City's, to preserve these documents, the  
18 holding pen roster and pedigree form, and why wasn't there  
19 destruction or loss at the very least negligent?

20           MR. THADANI: So first response is, as I mentioned  
21 earlier, the investigation resulted in -- I understand the  
22 plaintiff is going to dispute the propriety of it, but the  
23 investigation on its face closed with no allegation of  
24 wrongdoing. And so I don't know that that would necessarily  
25 trigger a duty to preserve.

1 THE COURT: Let me stop you right there.

2 So the investigation's conclusion obviously if it  
3 results in no allegation of wrongdoing, you know as counsel  
4 for the City, that certainly doesn't preclude lawsuits being  
5 filed. In fact, many cases the City has settled for  
6 substantial sums had initial internal investigations that  
7 resulted in findings of no liability on the part of the  
8 officers. And other cases the City's prevailed on at trial  
9 have resulted in initial findings of no liability or  
10 wrongdoing on the part of the officer.

11 So that does not -- once an investigation says we're  
12 not going to discipline an officer, that doesn't mean the City  
13 or the NYPD can start throwing away records.

14 MR. THADANI: Sure. I just want to make as a  
15 preliminary -- I guess I'm drawing -- this is not my lead  
16 point, but just to clarify.

17 THE COURT: Sure. And I asked you a very compound  
18 question.

19 MR. THADANI: My clarification just with respect to  
20 that is, yes, you're right, there are findings of  
21 unsubstantiated, exonerated, et cetera, leads to lawsuits.  
22 But in those cases plaintiff, the claimant, the individual, is  
23 still alleging wrongdoing even if there's no finding of  
24 wrongdoing.

25 My distinction was, the paperwork for that

1 investigation indicate that the plaintiff was indicating no  
2 wrongdoing by members of service and, therefore, to the extent  
3 that that is accurate, there really wouldn't be a thought that  
4 there's going to be a lawsuit if they've already talked to her  
5 and she's like, no, I'm not saying police did anything wrong.

6 Putting that aside, I think our argument with  
7 respect to the adverse inference is less about the duty to  
8 preserve. I think with respect to that it was more about the  
9 individual defendants not having a duty to preserve,  
10 understanding plaintiff's counsel made some arguments about  
11 filing, which is a little bit different. But our -- I mean, I  
12 think part of it -- like, to the extent there's a duty to  
13 preserve, I think the ques- -- our point would be more about  
14 the nature of the documents, what these documents are. Okay?

15 So the prisoner pedigree form is a document that is  
16 reflected basically verbatim into the command log. So the  
17 document, we don't have the document, can't find the document,  
18 the information is not lost to us.

19 THE COURT: Tell me why that's the case. Why is it  
20 always the case that's what's on the form is the same as  
21 what's in the command log? Why would they have two separate  
22 documents --

23 MR. THADANI: That is what witnesses have testified  
24 to and also what is the procedures in the patrol guide. And,  
25 moreover, I believe the function of this document -- I could

1 be wrong, and plaintiff's counsel can correct me certainly,  
2 their function for this document is, it indicates that  
3 plaintiff's physical condition was, quote, app normal,  
4 apparently normal, at the time she got to the precinct.

5 THE COURT: I'm sorry. I lost a little bit.

6 Which document are we talking about, please? Same  
7 as the command log?

8 MR. THADANI: Sure. The prisoner pedigree form,  
9 there are questions that are asked about an individual's  
10 pedigree, their name, their date of birth, where they live,  
11 their physical condition, et cetera. That information is then  
12 transcribed into an arrest stamp that's contained within the  
13 command log that has that same information.

14 And I believe with respect to this document,  
15 plaintiff's position is the relevance of the prisoner pedigree  
16 card, which we don't have, is that it would have said  
17 apparently normal as her physical condition. However, the  
18 command log says that her condition was apparently normal. It  
19 is undisputed, we're not disputing, that her condition was  
20 reflected as apparently normal. And, therefore, the document  
21 itself is not really relevant to the issues in the case. Yes,  
22 we can't find it. That doesn't automatically mean, well,  
23 there's spoliation and adverse inference because we can't find  
24 every single document that may have some relevance in the  
25 case.

1           So I think with respect to that document, I think  
2 from our perspective, it's a really easy issue because the  
3 information that's being sought is reflected in other  
4 documents, one; and two, it's an undisputed issue that it  
5 relates to.

6           So what is the adverse inference? How would this  
7 have been unfavorable to us and unfavorable for her when the  
8 information is undisputed and it's already documented in other  
9 ways?

10           THE COURT: Okay. So I'm going to give plaintiff a  
11 chance to respond to that in a minute, but why don't you go on  
12 to your next point.

13           MR. THADANI: And then with respect to the holding  
14 pen roster, I believe the position they took in their papers  
15 is that it would indicate her physical condition; however,  
16 there -- I attached the document as an exhibit, there's no  
17 space for that. And I'm not sure exactly what their basis for  
18 that is.

19           What it does indicate is who is being held and when  
20 checks are being made on them. So generally if you check on a  
21 prisoner every 30 minutes, 15 minutes, you have to put the  
22 time you check that individual. So the prisoner pen roster  
23 that I cite as an exhibit relates to another individual who  
24 was arrested along with plaintiff and indicates those times.

25           THE COURT: So is it your understanding that if an

1 officer is filling out the holding pen roster, they only put  
2 in the checks, but there's no substantive information? So  
3 even if they went in and the person had had a heart attack or  
4 passed out, they wouldn't put that on the roster at all?  
5 They'd just say checked at 10:42 a.m.?

6 MR. THADANI: No, I'm not saying that. I tried to  
7 address that in our papers too. There's like two prong.  
8 There's a remark section, so you can put comments. It's not  
9 necessarily physical condition per se. But in the scenario  
10 Your Honor provides, it's possible. I don't know that that's  
11 where it necessarily would be documented versus somewhere  
12 else, but it may be, so I don't know want to discount that.

13 But really the function of the document is once  
14 she's there, that's undisputed. Right? Then it's when is she  
15 being checked on, that's two. And then three, this remarks  
16 section with respect to Danny Rivera, who was the other  
17 individual that was arrested, all it said was he was taken to  
18 Queens central booking.

19 THE COURT: Right. And if I understand your  
20 argument, you're saying that essentially there's nothing to  
21 instruct the jury adversely on because there's no basis to  
22 believe that the document in any way would have contradicted,  
23 in fact, it would've supported the officer's account that they  
24 were coming as many times as they said, 17 or however many  
25 times they checked on her; and, in fact, under remarks they



1 could well have said, you know, she's kicking the wall,  
2 punching the wall, all the things that they alleged her to  
3 have done?

4 MR. THADANI: That may be there. I think that would  
5 refute a lot of plaintiff's argument in the case. I don't  
6 know. With respect to what they think might've been there,  
7 which it could have said, you know, injured hand, has to go to  
8 the hospital, there's no real reason to think that because  
9 they questioned the individual who is responsible for the  
10 document and his testimony was he didn't think she needed  
11 medical attention, he didn't observe injuries on her.

12 So yes, we don't have the document. This is a  
13 situation. We don't have the document. There's no dispute  
14 about that. But just because you don't have every single  
15 document does not lead to an adverse inference. Because I  
16 don't think there's the showing here that an adverse inference  
17 is warranted with respect to this document given what we know  
18 would have said/even what it does say.

19 THE COURT: Let me stop you right there. Let me ask  
20 plaintiff's counsel to address specifically this third prong  
21 of the required findings.

22 What basis do you have from which a reasonable trier  
23 of fact, meaning the jury, could find that the evidence would  
24 have or could have supported -- sorry, excuse me, would have  
25 supported your case on exactly what issues?

1 MR. HARVIS: So just to step back for a second. So  
2 what happens is, she's arrested in the evening. There's --  
3 whatever happens overnight happens. She's either hurt or she  
4 hurts herself in their story. And then, you know, these hours  
5 pass from when the incident happens at 12:30 until I think  
6 like 5:45 in the morning. And then no ambulance is ever  
7 called. She's taken to go to central booking along with  
8 Danny Rivera.

9 And Danny Rivera's testimony is that, you know, all  
10 along she's screaming and crying, they're both demanding that  
11 she have medical treatment, nobody is doing anything for them.  
12 And then it's only when she gets to central booking and the  
13 screener realizes that she's injured, that she goes to the  
14 hospital. And then when Camhi calls internal affairs to first  
15 report this, the first time it's ever reported, it's after  
16 she's already been checked out medically and they've already  
17 confirmed that, you know, she doesn't have any broken bones or  
18 whatever. And so -- and then Camhi tells the internal affairs  
19 investigator that she's good, but, you know, she's being  
20 released from the hospital and she's going to go back to  
21 central booking. But she doesn't go back to central booking.  
22 She gets brought back to the precinct. And she's kept there  
23 basically all day.

24 And so nobody has any explanation for why that  
25 happened or really any recollection of it happening. And so

1 it leaves a lot of questions, you know, that we don't have any  
2 basis to answer that would potentially be answered by this  
3 roster about, you know, after she's injured, who's checking on  
4 her? They're saying they're checking on her. Is that  
5 testimony true? When Ryan says he checks on her 19 times, is  
6 this a document that's going to show that that's, you know,  
7 consistent with the documentation or it's refuted by the  
8 documentation? Of course we don't know what the remarks say.  
9 But whenever there's spoliation, you never know what the  
10 document is going to say.

11 And the Second Circuit has said that the person who  
12 is dealing with a lost document can't be held to too strict a  
13 standard because we're all speculating about what this  
14 document shows. And the reason -- Your Honor was exactly  
15 right. As soon as someone was injured in their custody, the  
16 responsible thing for the municipality to do is to collect all  
17 the documents and then figure it out later, whether it's a  
18 valid -- you know, a valid issue or not. And so --

19 THE COURT: And I don't hear the City disputing you  
20 on the duty to preserve part. I think they've -- correct me  
21 if I'm wrong, Mr. Thadani, but essentially conceded that there  
22 was some duty on the City's part, if not the individual  
23 defendants' part, to preserve these documents.

24 I think the concern that they have raised, which I'd  
25 like you to address, is that even if you cannot say with any

1 certainty what these documents would have shown, what are you  
2 actually have beyond pure speculation that there would've been  
3 something helpful to your case in those documents that would  
4 really justify this pretty extraordinary remedy of an adverse  
5 inference?

6 MR. HARVIS: Sure. Well, I mean, we know -- just by  
7 their very design, we know that the prisoner pedigree form is  
8 designed to capture her physical condition, which is like the  
9 most important issue in dispute. And sure, we can assume it's  
10 identical to the command log, but that's nothing but an  
11 assumption. And on these facts we think we have the right to  
12 assume that it may have said something different. Or even if  
13 it did say the same thing, it would be another data point for  
14 plaintiff to point to and say, look, how many different times  
15 they wrote down that she didn't have any physical injury; it  
16 was both the guy who did the pedigree form and the guy who did  
17 the command log, they both had a chance to look at her. I  
18 actually think, of the two, the roster is the more probative,  
19 the more likely to contain important information.

20 Because, again, there's been specific testimony  
21 about how often she was checked on, and we think that goes to  
22 both the veracity of that testimony and the officer's  
23 credibility because, you know, it just -- it really raised a  
24 lot of questions for us that they could check on her 19 times  
25 after restraining her and not call her an ambulance. And we

1 just think that that document would provide a lot of insight  
2 into both that question and also, you know, where she was held  
3 and why she was brought back to the precinct after being taken  
4 to the hospital.

5 MR. THADANI: If I may briefly.

6 So none of that goes to how the document is helpful  
7 for them. So the undisputed facts are, she came in apparently  
8 normal. That is good for them. And that's -- and we're fine  
9 with that. Again, the allegation is something happened at the  
10 precinct. Whether it's caused by her or by the officers is  
11 the disputed fact. There's nothing that would've been  
12 favorable to warrant an adverse inference in the pedigree  
13 document. That's one.

14 Two, with respect to the prisoner roster form, the  
15 roster, to the extent it has times that being checked on, Ryan  
16 putting times that he checked on her is not favorable to them.  
17 There's nothing in the document that would be favorable to  
18 them. If they want to cross-examine, they can -- there's a  
19 remedy here. The cross-examination could be you're  
20 claiming -- and this only would be relevant to the deliberate  
21 difference claim, but you're claiming you checked on her every  
22 30 minutes. Do you have -- you have no documentation to prove  
23 that you did that.

24 THE COURT: So let me ask you this. What are you  
25 intending to argue that the jury could find that would or may

1 have been favorable to your client? Not something that  
2 supports -- I understand his point as being, if your  
3 contention is they would've put fraudulent or fake information  
4 in the pedigree form, that's something for which you would  
5 impeach them.

6 But if you had the document, your case would be even  
7 stronger rather than presuming, you know, that there was  
8 something in there. I mean, what are you intending to argue  
9 that would justify this instruction the document would've  
10 shown if preserved.

11 MR. HARVIS: Because what it would've shown is that  
12 he wasn't truthful when he testified that he checked on her  
13 19 times. That's what we think it could have shown. You  
14 didn't check on her at all.

15 THE COURT: Because your contention is that I  
16 checked on her 19 times was a belated fabrication, and that  
17 the form itself would have not reflected the frequency of  
18 those checks?

19 MR. HARVIS: Yeah. It either would've shown that he  
20 didn't check on her at all, that there were remarks that  
21 further undercut his testimony, or that he didn't check on her  
22 as many times as he said. You know, again, we're in a  
23 difficult position. We're the ones without the documents, so  
24 we're just trying to figure out what it might have said.

25 MR. THADANI: Your Honor, one last thing. I don't

1 believe the case law allows that sort of inference on such a  
2 speculative suggestion. There has to be something more in the  
3 record. There was questioning about it. We have the other  
4 document, by the way, that, again, I -- the issue is not the  
5 document; it's the second page. So we have the document. The  
6 second page is lost. And --

7 THE COURT: What's on the first page? Cover form?

8 MR. THADANI: The first page includes Danny Rivera's  
9 time in detention, includes the times he was checked on. And  
10 it's the second page -- presumably this would not have been an  
11 issue if the page didn't run out, but it goes to the second  
12 page. Rosie Martinez, presumably, is on the top the page.

13 THE COURT: And there's no dispute, I take it, that  
14 the jury is going to be told that the second page regarding  
15 Rosie Martinez is lost and cannot be located, right? The  
16 question is just whether they get an instruction that they may  
17 presume something about the circumstances of its loss or  
18 presume something adverse to defendants, because they're going  
19 to be told that that document is missing and is not available  
20 to them?

21 MR. THADANI: I mean, I don't know that that's an  
22 issue right now. I mean, I think our view would be that the  
23 fact -- I mean, look, I understand they're going to make a  
24 different argument. Our view would be that the fact that this  
25 document in itself wasn't located or wasn't found is not

1 relevant to the issues to be determined at trial. So I don't  
2 know that the jury is necessarily going to be informed of  
3 that. Like to the extent we're -- our argument right now is  
4 with respect to the adverse inference, we don't think the  
5 showing has been made. But separately as to whether the jury  
6 should be informed that out of over the 10,000 of pages of  
7 documents produced in this case were two pages not produced.  
8 I'm not sure that's something we believe the jury needs to  
9 necessarily know, well, this page wasn't produced, this page  
10 wasn't produced.

11           However, to the extent they ask -- questioning,  
12 again, I think that's entirely proper if Detective Ryan  
13 testifies, I checked on her every 30 minutes and they ask him,  
14 you don't have any document that supports that you did that, I  
15 think that's fair, fair game, and I think that would be, you  
16 know, something a jury would hear and there wouldn't be any  
17 documentation supporting that. They have to take his word or  
18 not.

19           THE COURT: And why couldn't we simply avoid the  
20 adverse inference instruction problem by simply telling the  
21 jury that the City's searched for and has been unable to find  
22 that document and they were able to find it for Mr. Rivera and  
23 not for Ms. Martinez without telling the jury what they could  
24 or should find as a result of it?

25           MR. THADANI: It could. It could.



1 THE COURT: Okay.

2 MR. THADANI: Your Honor, I don't know that  
3 Danny Rivera's document really -- I don't know. I guess I  
4 don't think they've listed it as an exhibit. I could be  
5 wrong.

6 MR. HARVIS: Can I just say one other thing,  
7 Your Honor, which is that -- you know, we talk about the  
8 Hanrahan report. Another thing that's important to remember  
9 about the Hanrahan report is that, according to Hanrahan, both  
10 Ryan and Camhi told Hanrahan that the incident where  
11 Ms. Martinez had to be restrained took place in the holding  
12 pen cells, which is a totally separate area of the precinct  
13 from the juvenile room where she was held.

14 So, you know, I know we're going to discuss the  
15 Hanrahan report, but I just -- you know, it's also probative  
16 of the question of, if Ryan was checking on her 19 times in a  
17 juvenile room, I think that that affects the credibility of  
18 him telling Hanrahan that actually this took place on the  
19 other side of the precinct in the holding pen cells.

20 THE COURT: Understood.

21 So let's talk about the Hanrahan report.  
22 Coincidentally that was next on my list.

23 So I have a question for plaintiff's counsel. I  
24 mean, I am concerned about this exhibit, that your purpose in  
25 admitting it is to prove some kind of broader coverup at the

1 NYPD about this incident. But the claims that essentially the  
2 constitutional claims that related most closely to or for  
3 which that evidence could arguably be relevant, supervisory  
4 liability, denial of access to courts, those were all  
5 dismissed by Judge Kovner.

6 So under what current claim that's going to go to  
7 the jury is this report relevant and why is that the case?

8 MR. HARVIS: Well, the report contains admissions of  
9 these defendants that are not hearsay and reflect their  
10 statements that are inaccurate about where this happened given  
11 according -- well, we're going to find out from defense  
12 counsel when this report was prepared. I'm excited to find  
13 out. But whenever it was is presumably shortly --

14 THE COURT: Well, to be fair, I think he's been very  
15 candid that he doesn't -- he doesn't know and he's putting it  
16 together based on inferences that we're all working with based  
17 on a date listed that everyone concedes is the incorrect date  
18 and the time in which these investigations would've typically  
19 started, so...

20 MR. HARVIS: Fair enough.

21 THE COURT: So I know that the issue of the data is  
22 one that we'd have to consider, if the report comes in,  
23 whether it gets redacted, what the jury's told.

24 But putting that aside, what is there that is in the  
25 report specifically that you couldn't otherwise get admitted

1 by cross-examining the defendants about their statements? Why  
2 does the report itself have to come in as opposed to simply  
3 asking the officer defendants, you were interviewed by a  
4 captain about this incident and you said X? Why couldn't it  
5 simply come in through cross? Why do they have to seal the  
6 report? Because it's hearsay from a lot of people and an  
7 author who isn't here.

8 MR. HARVIS: Well, I don't think it's hearsay  
9 because I think it's a business record where the officer was  
10 an under an obligation to make accurate entries in this  
11 report. And it really -- all the substance of it is  
12 admissions against people who are adverse parties in this  
13 case. So I don't see there being any hearsay, real valid  
14 hearsay concern there.

15 And then I just think it's tremendously relevant  
16 because this business record documents the first statements  
17 that the officers made regarding this event, and they are  
18 broadly inaccurate in ways that Judge Pollak has recognized in  
19 her decision awarding sanctions. And I think it's really not  
20 in dispute. And so I guess, you know, relevant evidence is  
21 admissible and it's not hearsay. And so I think the question  
22 should be, why wouldn't it be admitted in our view because  
23 it's a core relevant document. It's a first business record  
24 to document, you know, how the NYPD was looking at this.

25 And in our view, you know, we're not going to argue

1 any dismissed claims or try to get liability on any dismissed  
2 claims. But the fact that the officers took acts of  
3 concealment and misled investigators about what happened here  
4 is, in our view, strong circumstantial evidence to support the  
5 claims that are being tried. The reason why you lie about it  
6 is because you committed excessive force. The reason why you  
7 lie about it is because you should have gotten, you know, an  
8 ambulance for her. The reason why you go to the hospital and  
9 put wrong information in her medical records is because you're  
10 trying to create a smoke screen of a narrative that's going to  
11 avoid scrutiny of your conduct and avoid you being found out.  
12 I think that's, you know, the quintessential reason why people  
13 do things like that.

14 And I think if we're prohibited from being able to  
15 argue that inference, I think that that -- I think that would  
16 be unfair because I think it's strong evidence that supports  
17 the claims that are going to the jury.

18 THE COURT: So let me stop you there and ask the  
19 City. What's your response to Mr. Harvis's argument that this  
20 is -- the report itself should come in as a standalone  
21 document, as a business record, and specifically because it  
22 contains admissions by the individual defendants?

23 MR. THADANI: Okay. Just to clarify the record  
24 really quickly. It's not the first record about this. There  
25 was a phone call by Lieutenant Camhi that also clarifies the

1 discrepancies in the report that Mr. Harvis is so excited  
2 about. But it's not the first record. There were other  
3 records first.

4 With respect to the document, just to clarify  
5 initial point, we didn't actually move to preclude the  
6 document. We're moving to preclude the date and time error in  
7 the document which indicates that the interviews occurred six  
8 days beforehand. I think it is -- look, there's an issue with  
9 respect to the fact that the author of the document is  
10 deceased, obviously, right?

11 THE COURT: Right.

12 MR. THADANI: And there are issues in the document  
13 that can't be explained because he's deceased. I think there  
14 are issues with that. I don't think that necessarily makes it  
15 not a business record. I think it is. I don't think it's not  
16 relevant. I don't know whether the questioning can occur  
17 without the document. Whether the document itself needs to be  
18 in front of the jury, I'm not so sure. However, that's not  
19 what our motion was. Not to say we're waiving the right to  
20 raise that objection at the appropriate time, but we did not  
21 move in limine with respect to that, so I just want to make  
22 sure that's clear.

23 THE COURT: I mean, I would just say on that point,  
24 you know, you have the right to raise an objection at any  
25 point, but I would say, in part, because of the complicated

1 history on this case, in part, because he is deceased, I would  
2 really like to try to resolve any questions about what parts  
3 of his report do or do not come in, the dates, the  
4 conclusions, the statements as far in advance of trial as we  
5 can.

6 MR. THADANI: Sure.

7 THE COURT: So I'd ask you just now to tell me what  
8 you anticipate objecting to and why. It sounds like where you  
9 are is, you don't have a problem with the report itself coming  
10 in as long as the date itself is redacted or as long as, what,  
11 you're permitted to make some kind of argument or introduce  
12 the contrary exhibit about the other case to explain the date  
13 without your witness here, the author?

14 MR. THADANI: Sure. Yes. Okay. So I think right  
15 now what I can say is, our motion in limine was just very  
16 narrow with respect to that error. I think that I was a  
17 little bit surprised but also not surprised that there was an  
18 opposition with respect to just that, just the redacting the  
19 document. We didn't move to preclude. I know what I said  
20 about waiver. I would say Your Honor -- if Your Honor has  
21 already ordered us to provide a letter with respect to a  
22 couple of issues, I think if Your Honor doesn't mind I just  
23 want to consider whether we have an objection with respect to  
24 other aspects of the report and indicate that in that letter.

25 However, as of now, I don't believe so. I think the

1 issue is literally as narrow as I think it's just this bunch  
2 of a portion, like a very small portion in the top corner of  
3 the second page of the document, that has the wrong date and  
4 the wrong time because it's -- one, it's obvious. Forget  
5 about whether there's another IAB report that proves it.  
6 Let's just put aside for a second. It's nonsensical that six  
7 days before they interviewed about this incident. It's  
8 obvious that that's an error. We just don't have the  
9 individual here to explain it.

10           And plaintiff's counsel asserted in their motion  
11 papers the parties should be free to argue whatever they want  
12 with respect to that date and time error. And I think that's  
13 highly problematic because it's a distraction from the issues  
14 to be decided in the case. It's much simpler just to redact  
15 that portion that's a mistake instead of having potentially a  
16 mini trial, we're going to enter a document related to some  
17 other individual who had an incident at the precinct six days  
18 before that the jury is going to see to see, okay, well, the  
19 number, the IAB code number is the same as the IAB code number  
20 here, and so it must've been, like, that he used a template,  
21 which is what I was surmising in the motion. I don't know  
22 that for a fact. But that's the -- I don't want to say it's  
23 the necessary inference, but it's sort of the most likely.

24           THE COURT: I thought you made a very strong  
25 argument in your papers. It was among the many complicated

1 issues I was presented with. That one actually seemed pretty  
2 straightforward. A lot of us are familiar with the electronic  
3 template that explains the error.

4 And I guess my question for you is, if a report is  
5 coming in which among other things has a conclusion from  
6 someone who is deceased who can't explain the error but also  
7 can't be cross-examined about the basis for his conclusion  
8 that these defendants committed no misconduct and further, and  
9 probably most troublingly, states as fact that Ms. Martinez  
10 made certain statements that she not only denies making, but  
11 actually maintains that that interview never took place, that  
12 she was never given an opportunity internally to report what  
13 happened or asked to give her side of the story, how is it  
14 that the one piece of information on which the jury might find  
15 Captain Hanrahan's care, diligence, even potentially  
16 truthfulness, you know, gets redacted, but all the rest of it,  
17 including Ms. Martinez's statements, comes in?

18 MR. THADANI: I think there's a difference between  
19 using the template document and writing in new information  
20 than it is about what I guess they would allege is  
21 fabrications. They're also the ones seeking to admit the  
22 document as opposed to us, at least at this stage. They're  
23 the ones affirmatively trying to use the document. I assume  
24 they have a theory or questioning to sort of cast doubt as to  
25 specific aspects. They've indicated as much, that there's



1 inconsistencies with respect to what Ryan and Camhi are saying  
2 where certain events occurred. I think there's a sloppy --  
3 it's a sloppy report. Okay? Just frankly. He's not here to  
4 explain it, but the fact that that date is there, the fact  
5 that the descriptions are what are they are given we have  
6 other contemporaneous records that indicate that's not what  
7 they were saying, it's a sloppy record.

8 But I don't think that's a reason to permit -- it's  
9 a minor issue I think with respect to whether this should be  
10 redacted or not, but it's a distraction. And it's clearly  
11 erroneous. And I don't think it's necessary for defense or  
12 for the Court to spend time introducing irrelevant documents  
13 to prove or demonstrate or explain because the jury may be  
14 like, why is the date six days before? It's not the date of  
15 the report, by the way; it's the date of the interviews.

16 THE COURT: I understand. My concern as well or  
17 sort of broader is, you know, I don't know that we're going to  
18 get past hearsay threshold with this report because everybody  
19 agrees there's all kinds of indicia of unreliability. You  
20 might differ on what they are. You're saying there's a time  
21 and date error and a case number error. They're saying  
22 there's a whole interview that didn't happen. I'm not saying  
23 that certain statements couldn't come in, but it -- you know,  
24 there are some broader issues with it. Not to mention the  
25 entire history of what happened in discovery and what the jury

1 hears about that, you know, still considering it.

2 But I guess I'd just ask plaintiff, so for what  
3 purpose do you actually need the report? And, you know, the  
4 trial strategy is yours, but given that Ms. Martinez is  
5 alleged to have made all of these admissions of her own that  
6 this event never happened and she was never harmed in custody,  
7 what purpose or what relevancy does this have to your case in  
8 chief?

9 MR. HARVIS: Well, it really just shows that the --  
10 according to the defendants, you know, they provided  
11 contradictory statements about where this event took place and  
12 what it consisted of on the same day that, you know,  
13 Ms. Martinez was injured. So it's an immediate  
14 contemporaneous inaccurate account of, you know, key parts of  
15 the event.

16 THE COURT: And it's your concern that if you just  
17 simply cross-examine them and ask them, didn't you say this to  
18 your captain when you were interviewed on this date and they  
19 deny it, that you should be able to offer it as some sort of  
20 business record impeachment or some other thing? Why do you  
21 need to offer it up front as opposed to simply asking him on  
22 the stand and presuming -- I assume we're not going disavow  
23 those statements or have they already?

24 MR. HARVIS: That's a good question. I don't recall  
25 what their deposition testimony was on whether or not they

1 disavowed the statements. But I guess the fact that the  
2 City's investigation of this when it first happened was that  
3 they say they conducted an interview of Ms. Martinez that they  
4 didn't really conduct in which they say that she said that she  
5 didn't make any complaints even though we have all this other  
6 contemporaneous evidence that she was making complaints, both  
7 from Danny Rivera, from the notice of claim, the 50-H. I  
8 mean, right then it wasn't like there was some late made, you  
9 know, allegations.

10 And so the fact that the City conducted that kind of  
11 investigation at the beginning, this self-serving  
12 investigation where they categorize it as no allegation being  
13 made, put down it happening in the wrong place, we think all  
14 of that goes to the overall reasonableness of the defendants  
15 and how they treated Ms. Martinez and her allegations. And we  
16 think it's relevant for the jury to hear about it.

17 MR. THADANI: Your Honor, if I may briefly. The  
18 report is not created by the defendants though. So this is  
19 going to be a situation where this is a report they've never  
20 seen. So that's the theory is that this shows some kind of  
21 wrongdoing on behalf of the defendants. The defendants didn't  
22 create the document. They didn't review the document  
23 beforehand. They didn't confirm. It's not like I testified  
24 at a deposition and you review it and make sure the testimony  
25 is accurate and prepare an errata sheet. This is the document

1 that exists, but they didn't prepare it and they didn't get a  
2 chance to correct it. I just wanted to note that.

3 MR. HARVIS: It's the City's employee, Hanrahan, so  
4 we do have state law claims. So the fact that -- you know, I  
5 don't think it's inappropriate for the jury to consider  
6 what --

7 THE COURT: Well, but the state law claim is only  
8 about responding at superior on excessive force on assault and  
9 battery, right? Essentially the state law version of  
10 excessive force in which Hanrahan is not an individual  
11 defendant.

12 MR. HARVIS: That is true.

13 THE COURT: Okay. Let me just ask one more quick  
14 question about the procedural history.

15 Was this argument that you made about the issue with  
16 the date, meaning the explanation being that it came as a  
17 template from another case, something that was raised before  
18 Judge Pollak when she was considering sanctions?

19 MR. THADANI: I don't think so.

20 THE COURT: If you could check on that, I would  
21 appreciate it. I'm asking because while I found some  
22 plausibility to your argument that that may explain the date  
23 discrepancy, I'm a bit concerned that there was a factual  
24 finding and essentially a legal finding that this was  
25 significant in the history of the case and it goes to the

1 reliability of certain evidence, the potential usefulness to  
2 the plaintiff that Magistrate Judge Pollak made that was then  
3 adopted by Judge Donnelly and Judge Kovner that I'm not  
4 empowered to disturb by saying, you know, I see this  
5 differently so I'm just going to redact it.

6 MR. THADANI: I'm happy to put in writing I can  
7 confirm it. The reason why I can confirm it is because I  
8 wasn't able to figure it out until I got the document from the  
9 other case and that was well after that. I can confirm that.

10 THE COURT: Well after the sanctions?

11 MR. THADANI: Well after the sanctions order. So I  
12 could not have briefed it because I didn't know it to say it.  
13 I only realized the template issue when I figured out there  
14 was another IAB investigation or another internal  
15 investigation with the same sort of code name numbers relating  
16 to another case that happened to be on the date and time that  
17 is error. And again, that was much later in the case. I can  
18 confirm that in writing, but I can confirm that to you now.

19 THE COURT: Okay. Thank you.

20 Okay. It is 4:05. Why don't we take a five-minute  
21 break and then come back. Sounds good. So we'll be back on  
22 the record at 4:10. Thank you.

23 (Recess taken.)

24 THE COURT: We're back on the record.

25 Next I wanted to turn to the defendants' motion to

1 preclude allegations of the individual defendants' alleged  
2 other misconduct. I think I've now narrowed this down to two  
3 areas of inquiry that the City is asking me to exclude. One  
4 is any inquiry or evidence as to this alleged undercount of  
5 the amount of heroin found in plaintiff's apartment. And the  
6 second is Officer Digennaro's failure to properly complete an  
7 entry in his memo book concerning the search of plaintiff's  
8 apartment.

9 Am I right, that there's no other incidents other  
10 than Laliberte's issue with the arrestee in 2013?

11 MR. THADANI: I don't think I can answer that  
12 question because I tried my best to surmise what they might  
13 do. And so yes, those three, as Your Honor has mentioned,  
14 those two in Laliberte, I specifically identified I have a  
15 catch-all towards the end, anything else. It seemed like they  
16 weren't really -- plaintiff wasn't pushing anything else. So  
17 I believe the answer is yes, but I think that question is  
18 actually for them to say if they have something else they want  
19 to offer that I don't know about.

20 THE COURT: Plaintiff?

21 MR. HARVIS: Is there anything else that we're going  
22 to be crossing these defendants about besides --

23 THE COURT: Specific incidents of misconduct  
24 extrinsic to the incident involving Ms. Martinez other than  
25 the two I just mentioned and the 2013 incident involving

1 Sergeant Laliberte.

2 MR. HARVIS: It's hard for me to say because I  
3 can't -- I mean, are there other -- is a specific incident of  
4 misconduct when they, like, lied at their deposition? Like,  
5 for example, Digennaro initially testified at his first  
6 deposition that there were buy reports showing that  
7 Rosie Martinez had specific knowledge that Danny Rivera was  
8 dealing drugs out of her apartment. And then he came back for  
9 a second deposition and disavowed all that and started saying  
10 how that was wrong, that was a mistake. I mean he lied.

11 THE COURT: I'm not talking about that type. I  
12 understand inconsistencies in testimony and cross-examination  
13 about both the incident itself involving Ms. Martinez and any  
14 testimony or statements they've given about it.

15 I'm talking about extrinsic events happening either  
16 prior to or after this event involving unrelated citizens,  
17 defendants, that sort of thing.

18 MR. HARVIS: I understand. Okay.

19 So then I would say the answer to that question --  
20 hold on one second. I mean, I think -- Your Honor, I think  
21 that there was an incident where Digennaro had a prior  
22 finding -- finding of perjury, either perjury investigation or  
23 perjury finding. And so I just -- I don't -- I'm not familiar  
24 enough with the facts right now to just even give the full  
25 explanation of what it was, but I just want to flag that

1 because I do think that may be one additional -- do you want  
2 to jump in on that?

3 MR. THADANI: You're thinking of Forgione.

4 MR. HARVIS: Thank you.

5 Then no. The answer is no.

6 THE COURT: Let's talk about the other two. I have  
7 a preliminary factual question about this alleged undercount  
8 of the heroin. I saw, I think in the briefing, it was alleged  
9 that the undercount was by a single envelope, that there were  
10 286 actually recovered, but he was alleged to have written or  
11 he did write in his report that there were 285 or that was  
12 both Officers Ryan and Digennaro. But then in Pollini's  
13 expert report, he made some mention of lab documents saying it  
14 was 285 versus 290 that was actually recovered.

15 Does anyone know what the actual amount recovered  
16 versus the undercount actually is?

17 MR. HARVIS: That's a good question. I think there  
18 might be a discrepancy in the record about -- I think that in  
19 one part of the record, it may say 290 versus 285, and in one  
20 it may be 286 versus 287. That's my understanding.

21 MR. THADANI: I believe it's one. And I would -- I  
22 don't think I would've put that in if I didn't believe that  
23 was accurate. I think it is. It may be that there's another  
24 record that references 290. But I believe there was an  
25 investigation into this as well and paperwork created as a



1 result of that, and I believe that in that paperwork the  
2 discrepancy is a one.

3 THE COURT: And I take it the City's position is,  
4 whether it's one or five, given the total amount, that that's  
5 sufficiently minor or sufficiently due to error rather than  
6 malfeasance that's it's not relevant to his credibility in  
7 this case.

8 MR. THADANI: Yes. I think our position -- and  
9 again, it is an overarching point about most of our motions in  
10 limine is sort of trying to focus the case on what the case is  
11 about and try to screen the distractions. I think this is a  
12 primary example of one of many and is another one, you know,  
13 not necessarily I somewhat surprised that they opposed it.  
14 It's an undercounting. In theory it's beneficial for the  
15 plaintiff who is being charged with the drugs that there was  
16 an undercounting of the drugs.

17 But in any event, it's a mistake. I think it's  
18 easily explainable. This is something we're going to spend  
19 trial time on. I don't know that there's any jury that's  
20 going to, well, undercounting -- I mean, I don't have a  
21 photograph of it, I was looking at it today actually.  
22 They're, like, very tiny envelopes, like, smaller than these,  
23 like, one of these, like, Post-it flags, that's how small they  
24 are, and you're counting 300 of them in the middle of the  
25 night, it's not crazy to undercount by one.

1           Should they have been more careful? Probably. But,  
2           you know, to state that it goes to their credibility and their  
3           truthfulness I think is a huge leap.

4           THE COURT: Right. Your position is a mistake  
5           versus a lie, that those are two different things, and that  
6           that really doesn't go to their credibility but --

7           MR. THADANI: It would be different if it was, well,  
8           we found cocaine, we found heroin or we found \$2,000 or  
9           \$20,000. It's not even necessarily the magnitude per se, but  
10          the nature of the discrepancy at issue here, it's an  
11          undercounting of one.

12          THE COURT: So do defendants plan to offer any  
13          evidence through the officer's testimony for questioning  
14          Ms. Martinez about the amount of heroin that was recovered in  
15          her apartment that -- as a result of the search?

16          MR. THADANI: I'm not sure. Possibly. I mean,  
17          maybe not with a specific number. I mean if there was a  
18          specific number, I would imagine is probably is subject to  
19          cross to say, well, you miscounted the numbers. So possibly.

20          THE COURT: So if the number comes in, then the  
21          undercount is fair game?

22          MR. THADANI: I think it can be, you know, it can  
23          be -- you know, for instance, if we had did something like  
24          over X number, 250 over 270, I don't know that that  
25          necessarily brings in a discrepancy versus saying it's 286

1 exactly.

2 THE COURT: Why is that?

3 MR. THADANI: Because the discrepancy is -- I  
4 probably have to think about it a little bit more, but I think  
5 there's a difference probably between, like, over 250 versus  
6 exactly 285. Well, actually, when you counted, you thought it  
7 was -- actually, you know, I want to walk it back a little bit  
8 because I'm not so sure that -- you know, whether that  
9 evidence is presented or not -- let me take another step back.

10 Because I think there's a difference between the  
11 fact and the discipline. Okay? So I think to the extent  
12 they're trying -- and I think this relates to the other motion  
13 too. To the extent they're trying to elicit a fact that he  
14 undercounted or a fact that certain information was not in a  
15 memo book, I don't know that that -- that wasn't really our  
16 motion.

17 Our motion was -- and I think maybe they've agreed,  
18 but I'll let Mr. Harvis speak on it. Our focus with this was  
19 the discipline that resulted from it and the investigation  
20 into the allegations. That's sort of what our motion was  
21 about, not to preclude questioning about you were investigated  
22 with respect to undercounting, there was a substantiation,  
23 here's what your discipline was, et cetera, if there was one,  
24 same thing with the memo book.

25 THE COURT: Just so I know the history, because I

1 obviously missed the mark on what I thought the motion was  
2 about, there was an investigation and it was substantiated  
3 that he undercounted?

4 MR. THADANI: It was. It was.

5 THE COURT: And what was the discipline that he  
6 received?

7 MR. THADANI: I think it was like a retraining, but  
8 I'm not 100 percent on that. I believe it was something to  
9 the effect, like formal training, something like that, but not  
10 100 percent sure.

11 But that is sort of where our motion was targeted on  
12 is more the discipline and the investigation. I think --  
13 again, I could be wrong -- plaintiff's counsel did not push on  
14 that so much as push on the fact. I'm not so sure we have an  
15 issue with the fact per se.

16 Similarly, like with the memo, I know we haven't  
17 gone to the memo, but to the extent they want to question  
18 witnesses, I expect that they will, you didn't put -- what I  
19 anticipate, I don't think this is revealing much, because  
20 they're going to ask every witness, you didn't put in your  
21 memo book that you observed Rosie Martinez punching the wall  
22 and kicking the cabinets. I mean, that's not where we're  
23 moving to preclude. We're moving to preclude --

24 THE COURT: Let me ask plaintiff's counsel then.

25 What is the relevance of the undercount? They're

1 not disputing that it happened, that he off by either one or  
2 five envelopes. What, if anything, is the relevance of the  
3 undercount? And do you have any problem with them; A,  
4 introducing evidence or testimony that heroin was recovered in  
5 the apartment as sort of part of the series of events of why  
6 she was brought in for questioning to begin with; and if  
7 that's not an issue, do you have a problem with them saying it  
8 was over 200, 250, 285, whatever the number is?

9 MR. HARVIS: Well, I think that on our theory of the  
10 case, it has come in before the jury that there were drugs  
11 founds in the apartment because that's why they were trying to  
12 get information from --

13 THE COURT: I assumed so, but I never like to assume  
14 what any party or parties are agreeing on or think is  
15 relevant. So I'm glad we're all in agreement that that's at  
16 least part of the narrative. The jury will be told some  
17 heroin was recovered. And now the question is, will they be  
18 told an amount? And if so, is everybody in agreement that if  
19 the amount is told -- first, should the jury be told an  
20 amount? Second, if the amount is told, should they be told  
21 that there's no dispute that there was an undercount and told  
22 through -- I'll assume he'll admit it in his testimony if he's  
23 asked about it? And then I guess third, are you seeking to  
24 actually ask him about or introduce evidence that there was an  
25 investigation and he was disciplined for it? And if so, why?

1 MR. HARVIS: So I think the number should come in.  
2 I think the miscount should come in for really the same  
3 reason. They're both facts of what happened. And no one's  
4 disputing the fact that there's a miscount. I think it's an  
5 undisputed fact that he, in the performance of his official  
6 duties, made a mistake. They can argue it's a minor mistake.  
7 If I'm the person to be accused of a drug crime, how much  
8 drugs I have is not minor to me. I think it's important.

9 And it also just bears noting that Digennaro, who's  
10 a supervisor for Ryan, was also cited -- independent of what  
11 comes before the jury, he was also investigated, he had a  
12 responsibility to review the count. He also failed to do that  
13 properly.

14 So I'm just saying if we're talking about what  
15 testimony will be elicited from these witnesses, I think it's  
16 a fair minor point of discussion with both of them that, you  
17 know, yes, there were this many numbers, but you got it wrong  
18 and you were the supervisor and you got it wrong.

19 We're not seeking to offer the fact of their  
20 discipline. We don't believe that's relevant unless they open  
21 the door. But on the our case in chief, we don't there's any  
22 independent relevance to the fact that they were disciplined.  
23 So I think that answers the question.

24 THE COURT: Okay. So it sounds like we may not have  
25 a dispute.

1 MR. THADANI: I think so.

2 THE COURT: Fantastic.

3 MR. HARVIS: One down. 25 to go.

4 THE COURT: 15 or so more to go. All right.

5 So let's turn now to something on which I suspect we  
6 will probably still have a dispute, but I guess we'll see,  
7 plaintiff's motion to preclude evidence of her February 2019  
8 dispute with her neighbor or, as I saw on the video,  
9 neighbors, it looks like there were two of them, in her  
10 subsequent arrest.

11 So I think what may not be disputed is that  
12 defendants may seek to either offer or ask plaintiff about the  
13 March 1st hospital records that relate to this event where she  
14 was taken to the hospital and I think by the officers after  
15 she was arrested and given some medical treatment. And  
16 according to Mr. Thadani's letter, plaintiff is not objecting  
17 to the records coming in, I think, provided that any reference  
18 to the arrest in plaintiff's view is redacted from those  
19 records. Is that correct?

20 MR. HARVIS: Yeah, subject to -- assuming they're  
21 relevant, yes.

22 THE COURT: Yes, okay. So we'll deal with any  
23 relevancy, but no other objections.

24 So I have a couple of threshold factual questions  
25 for the parties about this incident.

1           Mr. Harvis, was Ms. Martinez ever charged with  
2 assault or any other crime in connection with this incident?  
3 And if she was, what was the result?

4           MR. HARVIS: It's not in the record, Your Honor. I  
5 don't know the answer to that. I believe that she was  
6 charged, and I believe that the charges were dismissed. But  
7 that's really just not much more than my understanding. I  
8 don't have any documents and it's not in the record.

9           THE COURT: Okay. Does the City know the answer to  
10 that? Was there a conviction?

11           MR. THADANI: I don't believe there was a  
12 conviction.

13           THE COURT: Okay. So no conviction.

14           And so I think I now understand, thanks in part to  
15 the supplemental letter, the purpose and the scope, but let me  
16 just see if I have this right.

17           You're seeking to ask her about this incident, about  
18 the allegations the neighbor made against her, and you think  
19 it's important and relevant for her to be asked or the jury to  
20 hear that she was arrested, because during the course of the  
21 arrest, her hands were put into cuffs and she didn't complain  
22 of any pain when she was being cuffed and she didn't complain  
23 of any wrist or hand pain when she was in the hospital later;  
24 is that right? It's really just for damages in terms of the  
25 extent of the injury?



1 MR. THADANI: Yeah, it is right. And I think the  
2 timeline here is really important. So it's not so much that  
3 she was arrested, but I understand it's, like, interwind,  
4 right? So there's no escaping it. I understand that.

5 But the key to the handcuffs, to us, it's a crucial  
6 fact in this case given the timeline because -- and there's  
7 actually -- I didn't brief this, I saw this afterwards, but  
8 there's a minute entry on the docket that supports this on  
9 February 14th of 2019. And so that means this conference, it  
10 occurred before Magistrate Judge Pollak two weeks before this  
11 arrest. Surgery likely set for March. So she was just about  
12 to get surgery on her wrist. Two weeks before this incident,  
13 she was about to get surgery. So now you're talking about two  
14 weeks later she is -- and I don't know if Your Honor has seen  
15 the video.

16 THE COURT: I have.

17 MR. THADANI: But she's handcuffed -- she's told  
18 she's handcuffed for a number of minutes. Doesn't say  
19 anything about I can't be cuffed, cuff me in a certain way, my  
20 wrist hurts, I have a wrist injury, be careful, anything like  
21 that. The handcuffs are put on. Nothing about, ow, my wrist  
22 hurts. No grimacing pain. Nothing about, I'm about to have  
23 surgery, please, if you have to handcuff me, can you handcuff  
24 me a certain way? Do I have to be restrained this way? And  
25 then nothing thereafter.

1           And then the fact -- obviously Your Honor has spoken  
2 to the medical records. And the fact that then after being  
3 handcuffed for a period of time she goes to the hospital, no  
4 complaints about her wrists. After being handcuffed on the  
5 wrist she's apparently about to have surgery on, she ends up  
6 having the surgery in November of 2019, I believe, because  
7 this arrest delayed it. I don't think I'm speculating.  
8 Plaintiff's counsel informed me of that during discovery. And  
9 so the time period really makes this pertinent.

10           It's not -- I understand there's a big difference  
11 between this event happens in 2015 and this happens in 2019.  
12 That I understand. I think normally that would be a very  
13 persuasive argument but for the fact that she's just about to  
14 have surgery on her wrist and her wrist gets handcuffed and  
15 she doesn't say anything.

16           THE COURT: Right. But doesn't -- I mean, I don't  
17 know, I'm not medical doctor, but surgery can be for a lot of  
18 reasons, including to restore range of motion, function, that  
19 sort of thing. It doesn't -- surgery four years after an  
20 incident isn't always necessarily for the treatment of pain,  
21 and I think we're going to hear that from her treating  
22 physician and from the experts in this case.

23           MR. THADANI: That is true, Your Honor. I think if  
24 that was the case, that would also be a persuasive argument.  
25 But the records clearly bare out that the pain is a major

1 issue with respect to having the surgery. This is not just a,  
2 I need to have surgery because I've been waiting to get to it,  
3 et cetera. It is because there's pain. Pain hasn't been able  
4 to be healed, at least that's what the records -- some of the  
5 records indicate. The records are very inconsistent. I  
6 suspect that will be a theme of this trial.

7 But some of the records indicate there's pain,  
8 consistent pain, other measures, like such as injections, such  
9 as other physical therapy, et cetera, has not worked, and,  
10 therefore, this surgery is necessary. And I think because of  
11 the timing, particularly literally the month of the surgery  
12 about to happen and because it's handcuffing in particular to  
13 that area of the body.

14 You know, if her injury was to her legs, I don't  
15 think this would even be an issue that she got handcuffed on  
16 her wrists. Who cares? But because it's literally her wrist  
17 and that's what she's having the surgery on and it's due to  
18 pain specifically, this all speaks to her credibility with  
19 respect to damages and to causation with respect -- and more  
20 really more so damages and her credibility and really the  
21 credibility of some of her doctors too with respect to whether  
22 the surgery was necessary, whether she had --

23 THE COURT: I'm a little confused about it. I  
24 understood from your briefs this is really only relevant to  
25 damages because of the --

1 MR. THADANI: I misspoke. The damages -- to some  
2 extent, a credibility issue and a damages issue.

3 Credibility insofar as she's alleging she's in  
4 significant pain, she's telling doctors she's in significant  
5 pain to her wrist at this time, which is why it's a subjective  
6 complaint and she is saying this in medical records, she's  
7 saying this in connection with this lawsuit.

8 And then, again, this is evidence of, is she really  
9 in pain? Is it as serious as she's saying, because if your  
10 wrist is really in debilitating pain such that you need  
11 surgery and you're about to be cut open to cure that pain and  
12 you don't even say anything, you know, there's -- I think  
13 there's a -- I don't really see the world where she's in  
14 significant pain such as the records bare out. I believe her  
15 testimony will bare out, and then you contrast that with these  
16 events.

17 THE COURT: You know, it's interesting because I  
18 viewed the video a little differently when I saw it. You  
19 know, she's standing very still, she's compliant. They're  
20 putting a cuff around her wrist. You know, it would be one  
21 thing if it was the night of the incident when her wrist was  
22 quite swollen and there might necessarily be some friction or  
23 contact with the cuff. You know, it seemed you almost had the  
24 better argument with the point about her wielding the --  
25 allegedly wielding a heavy object with the hand that's in pain

1 versus being passively cuffed, which just has a, you know,  
2 loose metal bracelet around. I mean I can understand you  
3 potentially arguing to the jury you would've thought someone  
4 in that kind of pain or with that kind of disability would  
5 warn the officers, say something to them in advance, but  
6 someone who's had an adverse experience with officers may have  
7 a lot of reasons why they wouldn't do so, maybe fear that it  
8 would get worse if they said that.

9 And I guess, you know, and just speaking a little  
10 bit to what I observed on the video, I think the -- you know,  
11 you would reference some admissions that she made. I think  
12 what you're really arguing is sort of admission by omission,  
13 that she isn't saying anything about her pain, not that she  
14 made an admission to any act, unless I'm missing something  
15 here, and please tell me if I am, about use of her hands.

16 MR. THADANI: Yeah. So one thing just to make sure  
17 I'm clear. I was not meaning to not argue the first  
18 component, which is the alleged use of the pipe and swinging.  
19 I understood your question to be focused on the handcuffing,  
20 which is why I addressed that first.

21 With respect to the admission, she does make  
22 admissions. She stated -- I don't think I put the quotes in  
23 the letter. She says, we started hitting on each other, I got  
24 my phone and tried to hit him. I tried to hit him with  
25 whatever I can. So she's being accused of what she did, and

1 then she's describing her version of the events, but while  
2 doing so admits using her hands, swinging her hands, swinging  
3 her phone, trying sort of -- there's other stuff too. Those  
4 are just some quotes there. I think, you know, the videos --  
5 you know, you can see what she says in the video.

6 So obviously that -- you know, to, I guess, circle  
7 back to that point, that is also part of our contention, which  
8 is that to the extent that she's alleging this pain and  
9 injuries to her wrist, to her hands, that she would engage  
10 potentially in that kind of an action, whether it be what she  
11 was accused of or what she admitted to, either of those  
12 events, also goes to her credibility, also goes to damages.

13 THE COURT: But she's specifically asked about the  
14 pipe, and she says no, I didn't have a pipe; all I had in my  
15 hand was my phone. So she never makes an admission about the  
16 pipe.

17 MR. THADANI: That's true. She does not --

18 THE COURT: The only basis for that is the statement  
19 of a neighbor who himself was brought in, arrested, and I  
20 assume not charged with anything.

21 MR. THADANI: That's true. She made counter  
22 allegations against him. You know, I don't know if Your Honor  
23 is interested in this, but just so I can raise it because it  
24 was raised in reply and we didn't have a chance to respond to  
25 it, plaintiff's counsel indicated that we didn't disclose him.

1 That is not accurate. We did disclose him as the complainant  
2 as a witness. He's not on our witness list. That was on  
3 March 21st, 2019.

4 THE COURT: So you're not planning to offer any  
5 testimony from him; you just simply want to ask her about this  
6 incident and potentially, if allowed, impeach her with the  
7 video to the extent she --

8 MR. THADANI: If necessary. In theory, he's an  
9 impeachment witness, but we -- I mean, it depends. I mean in  
10 theory, Your Honor and Judge Kovner didn't require the listing  
11 of impeachment witnesses or impeachment evidence. He is a  
12 potential impeachment witness. Depending on her testimony, I  
13 don't know what she's going to testify to with respect to this  
14 if there's questioning permitted on it.

15 But as Your Honor has noted, there's a lot of  
16 paperwork. Your Honor had asked us specifically for what are  
17 the documents we intend to question on. I think I tried to  
18 clarify to Your Honor that we weren't intending to question  
19 about documents. There's a lot of documents I didn't provide  
20 because we're not intending to go there, arrest reports, 9-1-1  
21 calls, 9-1-1 reports, criminal court complaints, all kind of  
22 other documents relating to this. I think the video would be  
23 potentially the impeachment evidence I wanted to flag for  
24 Your Honor given the inquiry.

25 THE COURT: So, okay, I think I understand your

1 position.

2 Let me just ask plaintiff's counsel to respond and  
3 specifically to address the argument that though there is some  
4 potential unfair prejudice to her from the jury seeing a video  
5 or even just hearing about a separate arrest, particularly in  
6 a case where no charges either were brought or she certainly  
7 was never convicted of any crime, putting that prejudice  
8 aside, there is some potential and maybe potentially  
9 significant relevance to damages in that she makes statement  
10 about getting into an altercation with a neighbor and then  
11 going to the hospital not complaining of hand pain and not  
12 saying anything to the officers when she's about to be cuffed  
13 about, careful with my hand, you know, it's very painful, that  
14 sort of thing.

15 MR. HARVIS: Well, I guess I think a number of  
16 things. One is that the -- it certainly is -- you know,  
17 there's no dispute that she has a hand injury. So this isn't  
18 a situation where they're, you know, trying to argue that this  
19 video proves that there was -- that her wrist wasn't injured.  
20 I don't think that that's an argument that the City could make  
21 on this record. I don't think that's really what they are  
22 trying to argue. And I think that the specifics here are very  
23 important.

24 First of all, the fact that it's happening in an  
25 arrest is inherently prejudicial, so I think that creates a



1 barrier to admissibility that I think has to be overcome by  
2 some sort of substantial showing of relevance.

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4 (Continued on the next page.)

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1 (Continuing.)

2 MR. HARVIS: And I think as Your Honor said, the  
3 fact that having been traumatized in handcuffs and abused by  
4 police and not given medical treatment in 2015, I think that  
5 there would be good reason for Ms. Martinez not to want to go  
6 above and beyond in having a big back and forth discussion  
7 with them about her wrist which is being handcuffed. As Your  
8 Honor, said there's no indication that they were overly tight  
9 handcuffs or even that they, at all, made any, kind of,  
10 contact that would be painful with her wrist, so I think we're  
11 making a lot of, kind of, assumptions there about how her  
12 wrists felt in that moment, and that therefore she had some  
13 failure to articulate pain that she must have been feeling. I  
14 think that that is a flawed assumption, I think that as Your  
15 Honor said.

16 In terms of the back and forth about this neighbor  
17 incident, I think that the fact of the dispute itself is  
18 prejudicial because it's just the jury hearing about some  
19 other argument that she had that I think would allow him to  
20 draw the impermissible conclusion that she's just an  
21 argumentative person, and you know, which would be support  
22 their narrative of what happened that night. I don't think  
23 there's anything that is inherently incompatible with having a  
24 wrist injury in 2015 means that you couldn't, you know,  
25 attempt to defend yourself with a cell phone in 2019. I don't

1 think that that has the kind of direct connection that you  
2 would need to see here in order for this to be, you know, a  
3 valid area of examination. I just think the prejudice far  
4 outweighs the probative value, and I think that it's a  
5 separate issue on the question of the medical record. I think  
6 that if you -- if they had a good-faith basis to argue that  
7 there was something in the medical record itself that was  
8 inconsistent with her having had the injury that she had,  
9 like, they did a test of her wrist and her range of motion was  
10 perfect or something like that, I think that would be a closer  
11 question. But I think that just arguing that she doesn't, on  
12 one particular trip to the hospital that isn't about wrist  
13 pain, she doesn't happen to mention wrist pain, I think it's a  
14 bit of a stretch, and I think it's -- I don't think that  
15 there's -- I don't think they have a good-faith basis to say  
16 to her on the stand, now, you know, you were in the hospital  
17 in 2019 and you didn't mention your wrist pain, and she could  
18 just -- she may not have --

19 THE COURT: Well, they could certainly -- to the  
20 extent -- I'm not saying this is what would happen, because I  
21 understand some of the circumstances around the altercation,  
22 if, in theory, the records were entered without any reference  
23 to an arrest or to cuffing or to the NYPD, she says she's an  
24 assault victim in the records, but, you know, they do do some  
25 exam, they're doing a thorough reporting of pain, they can ask

1 her and she can answer, why isn't that, at least, something  
2 that tends to make a fact at issue more or less probable that  
3 goes to the jury's consideration of her damages and frankly,  
4 as Mr.Jadi [phonetic] said, her reliability as a reporter in  
5 terms of what kind of pain she's in and why she's suffering.

6 I mean, why isn't she saying, I'm going to have  
7 surgery in two weeks? These are all questions she could all  
8 answer on cross.

9 MR. HARVIS: Right. I mean, the question is, is it  
10 probative to whether or not she had a wrist injury in 2015,  
11 that on a particular day in 2019, when she's alleged to have  
12 perpetrated a pipe attack that she disputes, whether or not  
13 she should have mentioned that she had pain in her wrist that  
14 day. I'm just not seeing why her -- the fact that she hasn't  
15 put that in the record at her medical visit allows them to  
16 argue that she's an unreliable historian about what happened  
17 in 2015. I just -- I don't see the connection.

18 THE COURT: Okay. I think I understand your  
19 position.

20 Do you want to respond?

21 MR. THADANI: Yes, Your Honor, if I may. Just a few  
22 points. I'll try to be brief. And I know, it's a lawyer  
23 saying that.

24 THE COURT: That's okay. I was a lawyer for 20  
25 years making all kinds of false promises about being brief.

1 MR. THADANI: I'll try to.

2 First, Your Honor, plaintiff's counsel stated  
3 there's no dispute there's an injury. So there is. I mean,  
4 there is going to be a dispute about whether she needed the  
5 surgery, whether she was truly in pain at that time period.  
6 So this is going to be an issue. And frankly, the fact that  
7 she doesn't mention her pain to other doctors is also going  
8 to be an issue in this case outside of this medical record.  
9 So I just want to make sure I preview that.

10 Second of all, it's not just that she didn't mention  
11 it, it is she is asked. If you look at the medical records  
12 and she is asked about different parts of her body and she  
13 doesn't say anything about her wrist. It's not like, tell me  
14 what's wrong with you. There's in the records every part of  
15 her body is referenced plus, minus, pain, swelling,  
16 tenderness, et cetera. So she was asked a question and she  
17 gave an answer, and it was, you know, either untruthful or  
18 potentially could have been untruthful.

19 A lot of plaintiff's counsel argument are weight  
20 argument, not about the actual probative value. It's about  
21 weight, this could be an answer, this could be an explanation,  
22 she didn't --

23 THE COURT: The most important thing is that the  
24 court reporter get a record, so everyone has my blessing to  
25 slow down, and I'll let you know if we are running out of

1 time. But week can all take it as slow as we did at the  
2 beginning.

3 MR. THADANI: The other thing I'll note as an aside  
4 is that this is not that dissimilar from the question we  
5 talked about at the beginning of this conference which is with  
6 Laliberte, so there is an excessive force allegation. They're  
7 trying to admit it for truthfulness. Here we have -- that's  
8 potentially prejudicial because it relates to a use of force.  
9 Here, we're talking about prejudice with respect to the fact  
10 of an arrest. But then this goes directly to damages and her  
11 credibility, based of showing of pain, not showing pain,  
12 taking this action, not taking this action, certain  
13 admissions. I do want to draw that comparison because, you  
14 know, I think it relates to some of the arguments being made.

15 THE COURT: All right. Thank you. I think I  
16 understand everyone's position.

17 Okay. Next. The Fortune Society medical records,  
18 plaintiff had moved to preclude them.

19 Is there still a dispute about the whether those  
20 medical records with any reference to prior arrest being  
21 redacted? Is plaintiff disputing the relevancy which you're  
22 entitled to do, I just want to clarify if we had a dispute  
23 over these or not.

24 MR. HARVIS: Yes, we are disputing that, Your Honor.  
25 These records are from several years before the incident, and

1 they do contain extrinsic information about the prior arrest  
2 and the dispute with her neighbor, and then they also just  
3 have a lot of irrelevant medical information in them about,  
4 you know, things are not at issue in this case. And I mean, I  
5 supposed we could discuss with the City, you know, a way that  
6 they could redacted, assuming that they can tell us what in  
7 there is relevant. But from what we have seen, it seems like  
8 it's pretty completely irrelevant.

9 MR. THADANI: Can I just make one initial point?

10 THE COURT: Absolutely.

11 MR. THADANI: So the fact that there's as much  
12 reference to us as the City is kind of exactly why we have the  
13 motion that we have.

14 THE COURT: I'm using this outside the jury's  
15 presence.

16 MR. THADANI: Sure. I understand. But that's, sort  
17 of, the function behind some of the motion practice, and  
18 that's an aside.

19 With respect to the document, I don't know -- I'm  
20 hoping I can say something that makes this not an issue, so  
21 we've indicated we've withdrawn it as an exhibit, we would use  
22 it for impeachment purposes only. Presumably, as a  
23 preliminary matter, means a jury is not necessarily seeing  
24 this document. It's really, like, I don't know what the  
25 plaintiff's going to testify to. There are statements here,

1 these records reflect statements she made about her employment  
2 history, about her emotional damages, about her medical  
3 history. There's a lot of stuff here. I redacted some things  
4 that were somewhat particularly sensitive. But this is  
5 really, like -- I think this gets remedied by the questions  
6 asked on cross, not so much the document because depending on  
7 her answers and whether the questions are allowed to be asked,  
8 we don't get here until there's a question and there's an  
9 answer, and then this becomes credibility. And then even  
10 then, it's to show her, presumably, and you made this  
11 statement, and she denies or doesn't deny. It's not  
12 necessarily something that goes to the jury. So I'm not sure  
13 this is really, like, an issue. Maybe I'm wrong, and that's  
14 okay. But I'm thinking this is really an issue about  
15 questions about trial testimony, as opposed to the document,  
16 because it's not a document that's necessarily going to go to  
17 the jury when it was before. It was, they moved, it was an  
18 exhibit, we reconsidered our position. It's no longer an  
19 exhibit. It's an impeachment document. In theory, we didn't  
20 even have to list it, but it's there.

21 THE COURT: And I see its value potentially as an  
22 impeachment document in the limited areas. I took a quick  
23 look at it where it addresses her employment history and  
24 plaintiff is claiming economic damages and future earnings. I  
25 mean, I think -- I'll tell you now, I see some of the things



1 in there as being areas of, at best, very tangential inquiry  
2 given the time period in advance, and my other concern is that  
3 jurors may know because we live in New York City that the  
4 Fortune Society is a diversion program or a post-release  
5 reentry program for people who have had some involvement with  
6 the justice system. You know, to the extent you want to ask  
7 her about you were seeing a mental health counselor, you were  
8 seeing a social worker, I'd be a little concerned about that  
9 reference, given how commonly it's known, and that it might  
10 indicate some prior justice system involvement that's really  
11 more prejudicial than probative in this case.

12 MR. THADANI: I understand that concern. I think,  
13 frankly, this is almost like a depends what happens at trial  
14 what she says. So I don't want to over-redact because I don't  
15 know what her testimony is going to be, I don't know what it's  
16 going to be on direct or cross. However, to the extent that  
17 there's something that's potential inconsistent with the  
18 records, I think -- and there may be questioning about them, I  
19 think there's a couple of different remedies. One is to raise  
20 it at sidebar before it's raised in front of the jury, and an  
21 alternative could be not mentioning, like, the name of the  
22 facility or even the type of facility. I don't know that that  
23 necessarily matters. I think so much as it's a medical  
24 professional. Presumably you're honest with people you talk  
25 to about your medical history, et cetera. Like, it doesn't

1 necessarily have to be a mental health or even naming the name  
2 of the place. I think because the point would be you  
3 testified X on the stand, you previously said Y, generally.  
4 I'm over-simplifying, Your Honor, obviously, but, like, that's  
5 the idea. I don't know that it's specifically the Fortune  
6 Society matters or that it's specifically to a mental health  
7 professional necessarily matters. So I think that may be  
8 remedied.

9 THE COURT: But I think to the extent it's  
10 impeachment, and we're talking, again, about circumstances  
11 under which a person would be expected to give a complete  
12 account, the source does matter. I don't think we would say  
13 it was a doctor if it was a social worker or if it was a  
14 therapist or it was someone else. So -- a teacher or a  
15 friend.

16 So I mean, statements are statements, and she can  
17 explain the context. I'm just concerned that when we're  
18 talking about something that did arise out of a prior arrest  
19 which everyone agrees should not come in, that we closely  
20 tailer the impeachment, if any, to the statements, rather than  
21 the circumstances.

22 So why don't we keep that mind. I don't want to  
23 create a mountain out of a molehill here since the parties are  
24 essentially in agreement that the records themselves from the  
25 Fortune Society are not being offered, that she may be cross

1 examined, if she opens the door, to some statements made, but  
2 with the understanding no not to mention of the Fortune  
3 Society will be made, and if you can agree on how you,  
4 perhaps, in advance would like to characterize the  
5 circumstances under which these statements are made so that we  
6 don't a lot of sidebars at issue during trial, I think that  
7 would be helpful. All right.

8 MR. THADANI: Understood.

9 THE COURT: Okay. Next, I wanted to briefly address  
10 defendant's motion to preclude evidence that defendants failed  
11 to read plaintiff her Miranda rights. I do understand, and I  
12 don't need to you to restate your substantive argument that  
13 the Supreme Court's case of *Vega versus Tekoh*, T-E-K-O-H, in  
14 which the U.S. Supreme Court clearly held that an officer's  
15 failure to read a suspect their Miranda warnings does not on  
16 its own constitute a violation of a Constitutional Right and  
17 the essentially that we not have a trial about a claim that is  
18 A, not cognizable, and B, not presented here regardless.

19 So I guess I would just ask plaintiffs to tell me  
20 first how do we keep this from being a mini trial about  
21 failure to read Miranda rights, given that that's not at issue  
22 here and can't be, and what relevance do you think this has  
23 to, specifically, the three claims that are still here?

24 MR. HARVIS: Sure. We don't want to make it a mini  
25 trial. I don't even think there's any dispute at all about it

1 that would warrant a mini or a major trial. I mean Rosie  
2 Martinez said she wasn't Mirandized and the officers say she  
3 wasn't Mirandized. So it's just a very, I think, integral  
4 fact that reflects, in our view, the way that they were  
5 treating Ms. Martinez, just like any other fact, where she was  
6 held, how she was handcuffed and restrained and spoken to, the  
7 fact that they decided against their own training, against the  
8 Constitution, although it may not be an independently -- you  
9 know, right that can independently be vindicated through a  
10 civil action for damages, does not mean that it is not a  
11 requirement under the Constitution and under the patrol guide,  
12 that if you're going to engage in custodial interrogation  
13 which everyone agrees happened here, that she would be told  
14 about her rights and she wasn't. We're not going to ask the  
15 jury to award damages, but it would be, in our view,  
16 unnecessary and it would serve no purpose for Ms. Martinez to  
17 be prohibited from testifying about one of the facts that  
18 shows that the officers were prepared to question her without  
19 following the proper guidelines.

20 THE COURT: So I think I would tend to agree with  
21 your point if the officers were actually conceding that they  
22 had an obligation to read her her rights and did not do so.  
23 And maybe I'm providing an explanation the officers themselves  
24 haven't begin. But my understanding I think from some  
25 excerpts was deposition is that, at least, one of the officers

1 is contending that he believed he didn't need to read her her  
2 rights because he wasn't actually questioning her, he was  
3 just, in his words, interviewing her and taking pedigree  
4 information.

5 Is that -- I guess I should ask defense counsel.

6 Is that his position and is there anything else  
7 relevant --

8 MR. HARVIS: I'm happy to address. And again, I do  
9 promise at the beginning of this conference when I stated we  
10 we were splitting up the topics, that is true still.

11 THE COURT: Mr. Kinney is ready to get in there.

12 MR. THADANI: That is still true. They're waiting  
13 to see what Your Honor brings them next and it just all  
14 happened to fall on me. But perhaps that will change at some  
15 point.

16 But just to address your question first and then  
17 some of the points Mr. Harvis made.

18 First of all, that is correct. I think actually the  
19 warnings are not required. It's a -- Miranda is a rule about  
20 preclusion. So if you get a statement that incriminates you  
21 and you didn't give the warnings, they're precluded. So  
22 that's -- and moreover, I think your question got to, like,  
23 characterization, so plaintiff's counsel just stated it's  
24 undisputed that this was a custodial interrogation. That is  
25 not undisputed. There is a different patrol guide section

1 relating to debriefing which is what this was. And it may  
2 sound like semantics, but it is a difference. The difference  
3 is, in a custodial interrogation, the questioning is seeking  
4 to incriminate the person who's being questioned. In a  
5 debrief, which I think actually is undisputed this is a  
6 debrief, given I know what plaintiff's counsel's version of  
7 the events are is they're asking about other crimes, other  
8 information to help gather information. So there was an  
9 intelligence officer in this case. He's one of the defendants  
10 in the case. His job is to debrief every prisoner about  
11 information concerning guns, primarily, but other information  
12 of crime in the neighborhood. So he can investigate that  
13 information. In fact, that's how there's a search warrant in  
14 case for plaintiff's apartment was from a debrief from another  
15 arrest that occurred about one or two weeks earlier. That's  
16 how we got here in the first place, was from a debrief --

17 THE COURT: So let me ask you, regardless of what  
18 the patrol guide says, are the officers in this case -- had  
19 any of them individually, as individuals, not the City, per  
20 your request, as well as the law, are any of them -- have any  
21 of them affirmatively stated that they believed that they were  
22 not an obligation to give her her Miranda warnings at any  
23 point during the many hours that she was held in custody  
24 against her will at the station in cuffs, and if so, what is  
25 the basis for their claim?

1           What have they said is the reason they haven't read  
2 her her warnings.

3           MR. THADANI: Yes, and I think it's because of the  
4 nature of the questioning. And I think the questioning was  
5 about -- from our view, it's a little bit different, but I  
6 think it reaches the same conclusion. In our version, it  
7 is -- she was asked about firearms, guns, other crime, and in  
8 their version, she was asked about where Danny Rivera got his  
9 drugs.

10           THE COURT: So it's individual defendants have each  
11 claimed that at no point after recovering 285 or however many  
12 it was glassine envelopes of heroin in her apartment did they  
13 ever ask her if she knew anything about those drugs or knew  
14 where they came from?

15           MR. THADANI: I'm not sure about what the testimony  
16 of everybody. I think this questioning was really all  
17 centered on one particular defendant, Digennaro, in  
18 particular, and I believe his testimony is that he debriefed  
19 her, very short period of time asked her where -- asked her  
20 about -- they're saying about Danny Rivera. Our position is  
21 that he was asking about firearms and other crimes and she  
22 refused to talks to him, so he never really got into the  
23 substantive questioning, so it never got to Miranda rights.  
24 And again, like, our view -- plaintiff's counsel mentioned it  
25 wouldn't be a mini trial. I think our view is that there

1 would be since, first of all, it listed several exhibits about  
2 this there's a patrol guide entry, they have portions of the  
3 student guide that they seek to enter with respect to the  
4 this, they have an expert witness, presumably, who they want  
5 to speak on this, and our position is they're not required,  
6 they can explain why they weren't provided and the danger -- I  
7 think our concern, primarily, over all of of this is first of  
8 all, it's tangential to the issues in the case which is was  
9 there force used on her or not, but more importantly there is  
10 really significant danger of unfair prejudice. If you tell a  
11 lay person whose knowledge is from television and from movies  
12 this person wasn't, quote, read their rights, no matter what  
13 instruction you give to that jury about damages, don't take  
14 this into account, this is not part of the claim, once you  
15 hear that, there's a significant danger of unfair prejudice,  
16 confusion -- especially when there's going to be, I think the  
17 amount of questioning they seek to have, the amount of  
18 exhibits they seek to have on it, they have a whole witness to  
19 talk about it. This is not, like, a one-question-and-done  
20 sort of thing, at least as it's being proposed now, and  
21 frankly, just hearing about it even from the plaintiff in  
22 terms of what happened in her version, they're going to hear  
23 that, and then that's enough to create an unfair prejudice  
24 especially given, I think, the minimal probative value, if.

25 Any, of this testimony which is just it's parts of



1 the story.

2 THE COURT: I guess I understand your point. I  
3 think two things. First, I would appreciate it, since I just  
4 asked to you tell me from memory what the individuals answered  
5 to this question was within the next few days, if you could in  
6 the letter you're already going to submit, just address what,  
7 if anything, the individual defendant said about the reasons  
8 why -- I understand it's undisputed that she was not read her  
9 rights -- but the reasons why they didn't do so, because one  
10 thing I'd like to consider and again, as with all of theses  
11 issues is, I'm not sure where I'm going to come down, is  
12 whether this issue, in fact, goes to their credibility about  
13 the other events in the precinct that night, because I think  
14 there is certainly a scenario under which a jury could find  
15 that their claim that they did not question her at all about  
16 the drugs in her apartment is itself not credible. If they're  
17 citing that as the reason, I should think it tends to make it  
18 more relevant to the dispute about what happened and how she  
19 was treated and what their interactions with her were then if  
20 they said, we asked her some basic questions, we talked to her  
21 about Rivera, but that didn't rise to the level of  
22 interrogation, and they have a good faith belief they don't  
23 need to read her her rights. But I'd likes to see what the  
24 testimony is to the extent it was addressed, and I certain  
25 hear your point about this being a side issue in the trial --

1           MR. THADANI: One thing as a caveat, I don't know  
2 that all of them were asked about this, so obviously, I can  
3 only provide based on the testimony. And again, I think it  
4 will bear out is again, like, from our position is she didn't  
5 want to the talk, so there was nothing. But I understand  
6 that's a dispute of facts.

7           THE COURT: Right. And I'm aware that there's parts  
8 of her deposition where she say she asked for a lawyer and  
9 wasn't given one, and that would be a disputed claim claim  
10 whether she was read her rights or not, because whether she  
11 was read them or not, if she asked or a lawyer, she's supposed  
12 to be given one, so that's not really relevant to Miranda,  
13 except that I could see a world where a jury wonders, well, if  
14 she asked for one and she knew her rights, then why wasn't she  
15 given one.

16           Okay. Let's move on. Expert witness Pollini and  
17 the NYPD Patrol Guide and the defendant's motion to preclude  
18 or limit his testimony.

19           So I know this report was written some time ago  
20 before Judge Kovner ruled on summary judgment, so I am  
21 presuming, and plaintiff's counsel can confirm if this is not  
22 the case, that there are, at least, significant portions of  
23 his report that will not be reflected in his trial testimony  
24 because they relate to claims that have since been dismissed.

25           Is that right?

1 MR. HARVIS: That's correct, Your Honor.

2 THE COURT: So the only question for me to decide is  
3 whether he meets the standard for relevance and admissibility  
4 under Rule 702, either as to liability or damages or both on  
5 the three remaining claims, excessive force, deliberate  
6 indifference to her serious medical needs, and the officers'  
7 failure to intervene, as well as the related state law claims.

8 Is that right?

9 MR. HARVIS: Yes.

10 THE COURT: So you know, one concern I have with  
11 this report on the excessive force issue -- and I certainly  
12 know he's been admitted as an expert before on cases with  
13 similar issues -- I think here there was a fair amount of  
14 language in the report that if he were to testify to it, I  
15 would have a jury disregard it, and I hope it will not come  
16 out of his mouth in which he says things like, the defendant's  
17 used excessive and unreasonable force. In which he cites  
18 Ms. Martinez's version of events as facts. So he says that  
19 they punched her, slapped her, kicked her. It occurred to me  
20 this might have been inartfully written and that what he meant  
21 to do was say, under her version of events, this constitutes  
22 excessive force.

23 Is that correct?

24 MR. HARVIS: Yeah. I don't see him having much of a  
25 role in deciding whether or not the force that was used is

1 excessive. I think that's where his value to the jury will  
2 probably be at its lowest point, in general.

3 THE COURT: Do you plan to offer him as an expert on  
4 excessive force in any way related damages? That is how far  
5 outside the bounds of permissible conduct it was if -- and  
6 again this is with an, if, the jury credits her version of  
7 events over the officers' which is of course the question for  
8 them to decide.

9 MR. HARVIS: I think that yes -- the answer is yes.  
10 I think that in the context of whether or not it was a use of  
11 force, how this sort of incident should be treated and  
12 documented, is something that he would testify about. But in  
13 terms of how far beyond the force that you would be permitted  
14 to use in that circumstance, this was, I don't know because it  
15 really is -- there really was no reason for any force to be  
16 used. So I could imagine a set of facts where there might be  
17 an expert to talk about, you know, this was the amount of  
18 permissible force, and this is how much they exceeded it. But  
19 since here, she was a handcuffed woman, you know, in this  
20 room, I don't think anyone's going to argue that there was any  
21 amount of force that was justified.

22 THE COURT: Well, I could certainly see it -- and  
23 maybe it's not even worth getting into because it's not this  
24 case -- a scenario where just like when an officer is subduing  
25 somebody in the course of arrest and has to use some force to

1 retain them, here, if what the officer said was true and she  
2 was harming herself, destroying property, causing damage to  
3 property, some force may be justified. But since Ms. Martinez  
4 is claiming that's not what happened, he's not here to testify  
5 about whether that's appropriate. And I think I understand  
6 that what you -- the parts of his report that you are  
7 currently offering his testimony on in light of the dismissed  
8 claims is that the credibility of their claim that they  
9 intervened in self to stop her from self-harming is undermined  
10 by their failure to follow police procedures on the paperwork;  
11 is that correct.

12 MR. HARVIS: That's right. And then also regardless  
13 of the injury or its cause, that the steps they failed to take  
14 during those hours that she was sitting in the room are  
15 also -- deviate from accepted police practices.

16 THE COURT: Okay. So let me ask defense counsel  
17 then, why is testimony from the police practices expert not,  
18 at least, relevant in the jury's consideration of proper  
19 procedures that could or should be used if your own clients'  
20 version of events is true, and why is that something that's  
21 not outside the experience and knowledge of the average jury,  
22 kind of what to do in a station house when an arrestee engages  
23 in self-harm or otherwise causes a danger to themselves or  
24 others.

25 Who would like to address that?

1 MS. McKINNEY: Me, Your Honor.

2 This goes to two points, Your Honor. In part, this  
3 argument also goes to defendant's point 10 in their motions in  
4 lim, also moving to preclude any motion of patrol guide  
5 sections.

6 The Joseph Pollini, you know, plaintiff's purported  
7 police practices expert relies very heavily in his report on  
8 various patrol guide sections which defendants argue are not  
9 relevant in this cases. It's not the controlling legal  
10 standard, particularly in cases like this where Plaintiff  
11 Martinez is asserting that her constitutional rights were  
12 violated. The courts have been very clear that that is not  
13 the controlling law in these cases which is generally why  
14 patrol guide sections are often precluded in this case. If  
15 you look at the -- Mr. Pollini's reports, he relies very  
16 helpful on patrol guide practices. That would be the first  
17 argument.

18 The second point to our argument is that these  
19 opinions in the reports are unnecessary because they relate to  
20 lay matters. He relies very heavily on a lack of improper  
21 documentation, which again, does not necessitate an expert  
22 report or opinion in this type of case. This is something  
23 that could easily be elicited through cross-examination of any  
24 of the individual officers on the stand when asked, you know,  
25 did you create there report? If so, why not? You do not need

1 a purported expert to take the stand to try to explain what is  
2 essentially just a lay person's opinion about whether or not  
3 documentation in this case should have been created. The  
4 remaining issues --

5 THE COURT: I'm sorry, when you say, a lay person's  
6 opinion, you mean that the jurors would be able to evaluate as  
7 lay people whether certain police forms or procedures should  
8 have been followed, and how old they had have that knowledge  
9 about whether the officers -- I certainly understand that the  
10 officers can and will testify about paperwork they prepared  
11 and why. But how is the jury going to have a basis to assess  
12 whether the officers are truthful and correct in their  
13 statements without the testimony from another person trained  
14 and who has some expertise in that area as a check, of sorts,  
15 because Ms. Martinez herself certainly doesn't have that  
16 experience or background, so why can't she call an expert to  
17 rebut that?

18 MS. McKINNEY: Because the officers as NYPD officers  
19 have their own baseline knowledge of how these procedures of  
20 paperwork are done. They can be cross-examined on that point.

21 Additionally, if you look at Mr. Pollini's opinion  
22 which we note in our motions in lim, essentially, he arguing  
23 that if information is not properly documented in the case,  
24 that it simply didn't happen which is something that has been  
25 previously rejected in the Circuit, an opinion that has been

1 previously rejected in the Circuit, because it is a conclusion  
2 that is far too speculative to be admissible expert testimony  
3 and therefore, it's going to be substantially more prejudicial  
4 than it is probative in this case and should be precluded on  
5 those grounds, as well.

6           Again, the remaining issues in this case are  
7 excessive force, whether or not officers failed to intervene  
8 in this excessive force allegation, and to be very clear, the  
9 defendants' position is that the plaintiff is completely  
10 fabricating this alleged beating at the hands of officers.  
11 That it simply didn't happen. You do not need the patrol  
12 guide sections as plaintiff's counsel admitted or an expert to  
13 go on the stand to tell anybody in the room that if an  
14 individual, any arrestee is handcuffed and not resisting, that  
15 of course, it would be excessive force and a Constitutional  
16 violation for any officer to beat that individual.

17           THE COURT: And just to stop you there, I take it on  
18 that point.

19           As it has in other cases, the defendants, the City,  
20 the individuals officers wouldn't object to an instruction to  
21 the jury that while it will be up to them to resolve a dispute  
22 about what happened on that night, if they find that the  
23 officers bent Ms. Martinez's thumb back, threatened her,  
24 slapped her, choked her -- you know, I'm paraphrasing, but I'm  
25 sure we will discuss what that instruction would like -- that



1 I could instruct them that that constitutes excessive force,  
2 and so your position is they don't need an expert to tell them  
3 that because they're going to be so instructed, and the real  
4 question is what they're going to find as a factual matter on  
5 that claim?

6 MS. McKINNEY: Yes. And also that patrol guide  
7 sections are not the controlling law as to what should or  
8 should not have been documented and whether or not that makes  
9 it more or less likely that this Constitutional violation  
10 occurred, and therefore, it should also be precluded on those  
11 grounds, as well.

12 THE COURT: Okay. I think I understand your  
13 position.

14 Is there anything else outside what you argued in  
15 your papers on either the patrol guide sections or the expert  
16 that you'd like to bring to my attention?

17 MS. McKINNEY: One second.

18 THE COURT: Sure.

19 MR. THADANI: Just a couple of things, Your Honor.

20 First of all, I think just to balance out the point  
21 my colleague made is, what is the relevance of the failure to  
22 document. To the extent they're trying to argue that this one  
23 event happened over the other because there was no unusual  
24 occurrence report or there was no document in the command log  
25 and there was nothing in the memo book, I'm not sure how

1 that's relevant. And frankly, there is contemporaneous  
2 documentation in the case anyway. We know. We just talked  
3 about it. We talked about Hanrahan's report, the IAB call  
4 made by \*lieutenant Cam reporting what was observed, et  
5 cetera. So a lot of this has to do with the failure to  
6 document, but that's not what the case is about. The case is  
7 about whether there was a use of force or not.

8 THE COURT: Let me stop you there, because I  
9 definitely understand your position. I think -- I certainly  
10 see the strength of your argument on the excessive force  
11 claim. I think where plaintiff makes a fair point, and I'll  
12 just ask you to address this specific thing, is that they're  
13 not saying the failure to document is itself the violation,  
14 it's that the gap in Pollini's view -- and you'd be free to  
15 cross-examination Mr. Pollini about why he's wrong, or have  
16 your clients explain why he's wrong -- but that what he  
17 identifies as the discrepancy between their version of events  
18 and what they claim were the self-inflicted injuries by  
19 Ms. Martinez and her conduct, versus the paperwork that they  
20 actually prepared, the individuals they did or didn't notify  
21 whether that happened, is something from which the jury could  
22 say belies of truth of their claim. That if, in the universe  
23 where what they say happened, they would have filled out forms  
24 A, B, and C, they would have notified individuals one, two,  
25 three, and the fact that they didn't do that is something from

1 which the jury could find this didn't happen. That's more  
2 argument, but that's the relevancy of those sections of the  
3 guide and relevancy of his testimony.

4 So please it will me why plaintiff is wrong --

5 MR. THADANI: Sure. So I think this pivots to the  
6 point I was jumping in to raise any way which is now that we  
7 know thanks to Your Honor's order which specific patrol guides  
8 we're talking about here -- and I don't know if Your Honor  
9 wants me to go through each one, because there's a fair amount  
10 and I have something to say about each one and how they  
11 don't -- either they're completely tangential because they  
12 relate to, not this issue, about rather, arrest processing or  
13 releasing a prisoner which didn't happen here, which I don't  
14 know why that's even on this list. But even the -- Pollini is  
15 tieing his report to the plain language of the patrol guide.  
16 He is basically just, the patrol guide says X, they didn't do  
17 X, so Y. So I'm not sure in his report he really applies any  
18 expertise besides he knows how to read the parole guide.

19 With respect to the patrol guide entries, they don't  
20 say what plaintiff is asserting they say. If you look at the  
21 specific sections, like, for instance, there's a section on  
22 unusual occurrence, it has description of what an unusual  
23 occurrence is. This item, this sequence of events is not an  
24 option there. They have procedures about what to do when a  
25 prisoner requires treatment. That's fair. But the version --

1 the contention here is whether she required treatment or not,  
2 not so much what should have happened if you thought that she  
3 didn't need treatment.

4           They have -- I mean, they have a entry with respect  
5 to Miranda which obviously we've spoken about, so I won't  
6 touch on. The same thing with the student guide section. I  
7 hinted at this, there's two arrest processing sections which  
8 the arrest is not an issue. There's no false arrested claim.  
9 I'm not sure why -- whether or not -- how she was processed or  
10 whether she was transported from the scene to the precinct  
11 really relates to any of the issues in dispute in the case.  
12 Two ten thirteen is the one that's probably the least related.  
13 It has to do with release of prisoners only applies when  
14 either you determine that the plaintiff didn't commit the  
15 crime or the DA's office says they're not pursuing charges.  
16 Not the case here. There's one on force guidelines which -- I  
17 think one is we made the case that Ms. McKinney has already  
18 raised this, given the allegations here, if the jury believes  
19 plaintiff's version, there's no dispute that it's a excessive  
20 force, and the problem with the force guidelines patrol guide  
21 entry is that really it's going to --- if the jury is going to  
22 see that, is going to get that, it's essentially an alternate  
23 form of jury instructions. If you look at the actual entry,  
24 it talks about the factors once you take into account with  
25 respect to whether or not forces is excessive or not --

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1           THE COURT: Given the late hour, I understand a lot  
2 of your concerns.

3           Let me ask plaintiff this. If Mr. Pollini is  
4 allowed to testify as an expert on the issues that you've  
5 identified here today, do you have any need to independently  
6 introduce the patrol guide's sections that you've submitted  
7 other than as something that he may reference in his testimony  
8 specifically tied to opinions that he's giving about these  
9 issues?

10           MR. HARVIS: No. The only other use for them that I  
11 could see beyond Peliney discussing them is just to the extent  
12 they come up in cross-examination. And that would not be to  
13 offer them before the jury, and that would not be to offer  
14 them before the jury, and that would only be on relevant  
15 topics. It would not be on the things that are of concern to  
16 the defense counsel.

17           THE COURT: So what I'm going to ask you to do --  
18 and again, I haven't yet ruled on the issue of whether he can  
19 testify altogether is, I'll leave it to you as to when. The  
20 quicker you do it, the easier it will be for me to give you a  
21 prompt ruling, so it's in everyone's interest to do it  
22 relatively quickly. Why don't you confer with your expert.  
23 Identify not just the sections of the guide, but the specific  
24 provisions within there upon which he intends to rely on the  
25 three remaining claims, provide them to your adversary, and

1 then let's see if we have any dispute about whether those can  
2 come in. He's not testifying on Miranda, even if that issue  
3 comes in. He's testifying on excessive force only potentially  
4 as to damages. And even then, the guide section may not be  
5 relevant because of what it addresses.

6 So I'll just ask you to narrow it as best you can  
7 and identify those sections and let's see if we have a  
8 dispute. And if we do, then defense counsel can send me a  
9 letter and let me know the basis for your objections in that  
10 context. And if I have it in time to rule on when I do the  
11 written ruling on the rest, I will. If not, we can save it  
12 for trial. All right?

13 MR. HARVIS: Yes, Your Honor.

14 THE COURT: Okay. Let's talk next about another  
15 expert, Dr. McMahon, the orthopedic surgeon.

16 So I've reviewed his report and I understand the  
17 opinions that he formed as of the date of his report in 2017.  
18 I know that he has not, according to defense counsel, updated  
19 his report since February of 2017.

20 Let me ask plaintiff's counsel, do you have any  
21 intention of having him testify about any treatment she  
22 received or her condition after the date of his report?

23 MR. HARVIS: No.

24 THE COURT: Okay. So if that's the case, then let  
25 me ask defense counsel, what grounds do I have to exclude it

1 on the ground -- you know, on the basis that it hasn't been  
2 updated? And isn't anything that you've argued with respect  
3 to the lack of reliability or validity of his opinion  
4 something that you can address through cross-examination about  
5 how he hadn't examined her in, I guess, close to five years  
6 now, maybe more? And doesn't that really go to weight rather  
7 than the admissibility?

8 MS. MCKINNEY: Defendants are not going to object as  
9 long as they do limit Dr. McMahon's testimony to anything  
10 prior to February 3rd, 2017, in the report.

11 THE COURT: Okay. And I take it that means he's  
12 also not going to rely on any records of hers produced after  
13 that date?

14 MR. HARVIS: That's correct.

15 THE COURT: Okay. All right. Let's go to one that  
16 I expect may be a little trickier on the defendants' motion to  
17 require plaintiff to name two specific defendants in her  
18 excessive force claim.

19 So, first, this references a point Mr. Thadani made  
20 earlier. I understand you didn't move for summary judgment on  
21 the excessive force claim itself because there's clearly a  
22 factual dispute, and, as you've said, if the jury credits  
23 Ms. Martinez's version of event, they could certainly find  
24 that someone engaged in excessive force from the NYPD that  
25 night.



1 But my question is, why didn't you move for summary  
2 judgment as to the individual officers that you represent on  
3 the grounds that there was not enough evidence that any of  
4 them as individuals committed the acts that they were alleged  
5 to?

6 MR. THADANI: That's a good question. It's because,  
7 as I noted earlier and the complaint still states, only  
8 Forgione and Weitzman used excessive force at the time that we  
9 filed the motion for summary judgment. And so there, there  
10 was an issue -- it was an issue of fact. Use of force or not.  
11 That's why we're here at trial. It wasn't until opposing  
12 summary judgment that the plaintiff finally changed from  
13 Weitzman and Forgione to Ryan and one of three people. And so  
14 at that point -- we're past moving for summary judgment at  
15 that point.

16 MR. HARVIS: May I respond to that, Your Honor.

17 THE COURT: Sure.

18 MR. HARVIS: Yeah. I mean, I think that's totally  
19 misleading honestly because we had proceedings before Judge  
20 Pollak, we were in front of Judge Pollak like on almost a  
21 monthly basis. She -- before the Court and with defendants  
22 they knew that there was an evolution and we were getting  
23 discovery and that they almost got their case dismissed  
24 because of terminating sanctions on this very issue. And  
25 there was multiple conferences where we would go before Judge

1 Pollak and talk about where we stood and what was our current  
2 understanding of who we thought it was and they're just -- the  
3 idea that they were somehow -- it came out of left field that  
4 these were the people that we were saying were potentially the  
5 wrongdoers on the excessive force claim is just not true. And  
6 pleading in the alternative is totally accepted in the Second  
7 Circuit.

8           And the City, and I use that purposefully here, is  
9 liable regardless of who it was that actually hurt her on the  
10 state law assault and battery claim, which was sustained at  
11 summary judgment by Judge Kovner. We don't need to show  
12 personal involvement. And so the jury -- if the jury is  
13 somehow told that they cannot consider certain defendants as  
14 having assaulted her, that would actually be intention with  
15 what the law is on the assault and battery claim where there  
16 is no personal involvement requirement.

17           And there is -- it is we believe perfectly  
18 appropriate factual dispute to resolve by the jury. We're not  
19 suggesting that more than two officers did it, but we believe  
20 it's for the jury to decide on evidence that the Court has  
21 already held is sufficient to raise triable issues with  
22 respect to these defendants. We believe Judge Kovner  
23 specifically reached that issue in the opinion and the  
24 defendants did not seek reconsideration of that opinion.

25           And we don't see any reason -- we think that it

1 would be a wrong on the law for us to have to select it, and  
2 particularly given the fact that there was strong evidence  
3 here and findings from the Court that they were -- that they  
4 concealed their identity and frustrated the fact-finding  
5 process in terms of --

6 THE COURT: So is it your position that the jury  
7 should not be told and need not be told which of the two  
8 defendants, that the verdict sheet could actually list all  
9 four, and you will tell them there were two and it's up to  
10 them and you don't even have to take a position as to which  
11 two?

12 MR. HARVIS: Well, I don't think that -- right. I  
13 think that the verdict -- the correct verdict sheet would list  
14 all of them, but it would say underneath it, you know, you  
15 should select two. If you've selected two, go on to the next  
16 question. That would be how we would think it would be  
17 appropriate, because we don't think this record -- you know,  
18 we don't think -- since there's sufficient evidence that would  
19 sustain a verdict as to personal involvement for any of these  
20 four people on the excessive force claim, we think that it's  
21 appropriate for the jury to make that final determination just  
22 like any other question of fact.

23 THE COURT: What's your response?

24 MR. THADANI: Sure. Okay. So, first of all, to the  
25 extent plaintiff's counsel is referencing -- I mean, if you

1 just look at the first two paragraphs of our reply to the  
2 motion for summary judgment opposition, we expressed shock and  
3 awe by the fact that this was happening. That's how we  
4 started the reply.

5 THE COURT: That what was happening?

6 MR. THADANI: That we've gone from these two  
7 individuals. Understood -- I think there was an understanding  
8 that they were at some point perhaps going to come off of  
9 Forgione and Weitzman to somebody else. Who those people  
10 were, I still don't know right now today. I don't think they  
11 know by the fact of what they just said, and that they picked  
12 one and then one of three people. We addressed that in  
13 summary judgment.

14 It wasn't even an issue. We didn't rule on  
15 excessive force. They brought it up as part of many different  
16 issues that are raised on opposition. We raised that in the  
17 reply, immediately raising an objection to the fact that that  
18 was happening. Judge Kovner didn't rule on it because it  
19 wasn't before her. There was no issue with respect to  
20 excessive force there.

21 With respect to -- they keep mentioning this  
22 concealed identity. I have no idea what that means. I don't  
23 even know how to respond to it. I truly don't know what that  
24 means, that the defendants were concealing their identity.

25 MR. HARVIS: Can I tell you, Your Honor, what it

1 means?

2 THE COURT: You can tell me. Address me instead of  
3 your adversary.

4 MR. HARVIS: Thank you. What it means is that Ryan  
5 went in front of the CCRB and was asked 45 minutes of  
6 questions about that night specifically and chose to say  
7 nothing or acknowledge his involvement in grabbing  
8 Ms. Martinez.

9 We -- Hanrahan -- there may be a facially plausible  
10 explanation for it, but what Hanrahan -- there is a set of  
11 facts in which he used the wrong numbers at the top, put down  
12 the wrong date, said that she had been interviewed and didn't  
13 make any complaints, and then filed their way in a drawer and  
14 no one ever knew about it. And as a result, we all spun our  
15 wheels for like two years in discovery.

16 And so, you know, that is really what I'm getting at  
17 when I talk about the concealment, that Ryan affirmatively  
18 concealed that in his CCRB testimony, and that we think --  
19 although now it's difficult because he's deceased, we think  
20 that, you know, there was an effort also at kind of through  
21 the Hanrahan report kind of putting this under the rug.

22 And we understand that may not be able to be fleshed  
23 out at trial as much as we would like, but we certainly think  
24 it's a valid contextual point to make. I'm going to let  
25 Mr. Thadani --

1           MR. THADANI: Sure. So I still don't know what that  
2 means. I truly mean that.

3           So the fact that Ryan -- I tried to explain this I  
4 think in some of the papers, but again, there's a lot of  
5 factual history here. Ryan was questioned about allegations  
6 made by a nonparty, Danny Rivera, with respect to what  
7 happened. With respect to Danny Rivera, yes, he did not  
8 mention anything about Rosie Martinez punching the wall,  
9 kicking cabinets. He was not asked about that or his  
10 observations relating to her at all. I suspect that will come  
11 out in trial very clearly.

12           THE COURT: I'm sorry, even though she was the  
13 injured prisoner that prompted Camhi's phone call to IAB,  
14 Hanrahan never asked Ryan any questions about his observations  
15 with Ms. Martinez at all?

16           MR. THADANI: I apologize for not being clear. So  
17 Ms. Harvis is reflecting a CCRB investigation. That is  
18 completely separate from all of this. That relates to --

19           THE COURT: I see.

20           MR. THADANI: -- allegations made by Danny Rivera  
21 he's alleging excessive force against him. And in connection  
22 with an interview of Detective Ryan there, he did not speak to  
23 what he observed Rosie Martinez doing. He was not asked about  
24 Rosie Martinez, and he was not asked about those observations.  
25 Again, I know that will come out at trial.

1 THE COURT: And he was not interviewed by Captain  
2 Hanrahan?

3 MR. THADANI: He was. So with respect to that --  
4 and that's the Hanrahan report we're talking about -- it  
5 states that he observed her punching the wall and kicking  
6 cabinets.

7 So this is not a -- I mean, I don't know how you can  
8 say he's concealing his identity. The most contemporaneous  
9 document that reflects what he observes states that. But also  
10 as an aside, that's not concealing your identity. The  
11 plaintiff is stating this happened in a well-lit room, no  
12 one's wearing masks. I'm saying who did this? There's been  
13 video depositions, hours long, of every single person.  
14 There's been photographs produced of every single person. His  
15 argument is concealing identity. They're all saying it didn't  
16 happen. So in and of itself they're concealing their  
17 identity, if that's your definition of it.

18 Plaintiff has the burden of proof, to prove personal  
19 liability of specific people. This is not let's put four  
20 names and let's just see what the jury does and they'll put  
21 check marks wherever they feel like. That is not the law.  
22 There are situations where the plaintiff cannot identify  
23 somebody. For instance, let's say they are, you know, facing  
24 the ground and cannot see who is assaulting them among ten  
25 officers. That may be a situation that would make sense for

1 maybe something like this where I don't know who hit me  
2 because I didn't see it. So I can't say whether it was  
3 Officer Jones or Smith or whoever.

4 But here that's not this case. This case is, she  
5 saw who did it. She is alleging who did it. This is not for  
6 the jury to just decide, well, I increased my statistical odds  
7 if I put four names on there and they get to pick two, I have  
8 a better chance of winning now because it's not just two  
9 people there. There's -- I don't know this for a fact, but I  
10 can't imagine there being any verdict form that is anything  
11 like that, pick two. So the first question is, did the  
12 defendants use excessive force? If so, pick whichever two you  
13 feel like picking. It's an ab- -- I think, frankly,  
14 respectfully, absurd position.

15 THE COURT: I mean that's a bit of a -- we all know  
16 a verdict sheet would be much more specific than that and talk  
17 about burdens and reasonable doubt and all that. But I get  
18 your point that there's a -- it's not a multiple-choice exam  
19 regardless of what burden they're held to, that your position  
20 is and you've cited some case law and support that at least by  
21 the close of the evidence before the case goes to the jury, if  
22 the plaintiff's contention is that two officers assaulted her,  
23 your position is that she must make some assertion to the jury  
24 about who those two were and they must decide if they credit  
25 that allegation.



1 Is that the your accusation?

2 MR. THADANI: I mean, in part. I think it's -- I  
3 don't know that it's appropriate or fair in these -- and  
4 again, they keep raising sanctions in discovery and  
5 misconduct. We're past that now, right? Discovery is closed.  
6 All the discovery is done. The sanctions already happened.  
7 All the motions papers are done. We're at trial now. Okay?  
8 And I don't think it's proper to raise a claim that they admit  
9 is only against two people that she saw and then say I'm going  
10 to bring it against four people. I don't know that that's  
11 fair. I don't know that that's --

12 THE COURT: When you say you don't think it's  
13 proper, I know that you didn't move for summary judgment on  
14 excessive force, are you disputing Mr. Harvis's statement that  
15 you were on notice because of everything that happened before  
16 Judge Pollak, the huge dustup that came when Officer Ryan's  
17 statements came to light, when the Camhi phone call came to  
18 light, that you weren't on notice that they were likely or  
19 certainly going to be named as individual defendants in this  
20 case?

21 MR. THADANI: I think my expectation was they would  
22 find -- at some point identify two people.

23 THE COURT: Okay.

24 MR. THADANI: I want to make it clear. That's the  
25 issue. It's not that they changed from person A and B to

1 whoever else. It's they're saying it's two people. Name two  
2 people. And we would not have moved. I can tell you right  
3 now. If they had done that before summary judgment practice,  
4 we would not have moved for summary judgment.

5 THE COURT: So let me just try to bring this part to  
6 a close and see if I understand the issue. And I apologize if  
7 this was more clearly stated in your motion and I didn't grasp  
8 it at the time.

9 What exactly is your motion in limen? What are you  
10 asking me to order? It's a motion to have her name two  
11 specific individuals for the excessive force claim. When are  
12 you saying she needs to name them? What am I limiting and  
13 what am I instructing plaintiff to do?

14 MR. THADANI: So I think it is not appropriate for  
15 the trial, at the beginning of the trial, for the claim of  
16 excessive force to be against more than two individuals. I  
17 understand their argument with assault and battery. That's  
18 fine. I get that. But with respect to excessive force in  
19 particular, if the allegation is two individuals use excessive  
20 force on me, the trial should be -- when the trial begins and  
21 when the jury is told what the claims are and even during  
22 opening statements, before that starts, it should be -- the  
23 claims should be asserted against two people, not let's see  
24 what all the evidence is. Both sides do a whole trial and at  
25 the end right before closings we'll decide if even that's -- I

1 don't know if that's where Your Honor was leaning or not. But  
2 even that I think is inappropriate.

3 It should be the before the trial they decide we're  
4 bringing this particular claim, assault and battery is a  
5 separate thing, but with excessive force in particular where  
6 they concede in the heading of their opposition, plaintiff  
7 only brings this claim against two defendants. Who are the  
8 two defendants? We already know presumably Ryan is one of  
9 them unless that's a backtrack. I don't know. But the  
10 affidavit said Ryan and one of these other three people. So  
11 really it's really just identifying one of the three people.

12 THE COURT: I understand that point. You buried in  
13 there though a little reference to, well, assault and battery  
14 is separate. So you seem to concede that she wouldn't need to  
15 choose based on assault and battery. So as long as she's  
16 going to have the opportunity to name any of the four because  
17 of the City's liability if they find for her, what is the  
18 point of artificially limiting her on the excessive force  
19 claim? Isn't the jury going to be incredibly confused when  
20 they're told on the one hand you can find as a matter of state  
21 law that any of four of these defendants assaulted her if you  
22 believe that happened, but as a matter of federal law, you  
23 have to pick two. If I were a juror, I don't think I would  
24 know --

25 MR. THADANI: So in their JPT0, plaintiff's

1 indicated that assault and battery claim -- let's see if I can  
2 find the page. It's on page 2. State law assault and battery  
3 against City of New York. That's the only defendant they have  
4 for that claim.

5 Our position in line with the motion in limine we  
6 made about the City of New York, the question should be, was  
7 plaintiff -- something to the effect of, you know, did  
8 plaintiff prove by a preponderance of the evidence that she  
9 was subjected to an assault and battery on January 23rd, 2015?  
10 There's no -- it's a yes or no question. There's no Ryan,  
11 Camhi, Digennaro, pick a -- flip a coin in the air, you know,  
12 pick whoever you want.

13 THE COURT: And you don't have any objection to it  
14 going to the jury in that form, in some form, that  
15 particular -- the state law?

16 MR. THADANI: I think we have to see where the  
17 evidence -- the evidence may not support that. But to the  
18 extent we're going into trial, right, and the claim is an  
19 excessive force against two people, the City -- the state law  
20 assault and battery is against the City, that's how it should  
21 go through, excessive force against two people because  
22 personal involvement matters for Section 1983 claim. And  
23 assault and battery against the City, okay. That's the claims  
24 that they are asserting going into the trial.

25 THE COURT: Okay. Do you have anything to add

1 besides the points you've already made specifically about the  
2 issue of any authority you have that says you do not have to  
3 name before trial who the two individuals are?

4 MR. HARVIS: I would just point to Rule 8 and the  
5 fact that alternative pleading is permitted under the Federal  
6 Rules, and that we would be saying that Ms. Martinez alleges  
7 that she was assaulted by Ryan and one of these other three.  
8 One of the issues for the jury to decide is, was she  
9 assaulted, and was it one of these three?

10 And we're not aware of any authority that  
11 requires -- you know, we just have to have enough evidence to  
12 show personal involvement. And we think there's no way to  
13 read Judge Kovner's decision other than, you know, agreeing  
14 and holding that there was sufficient evidence presented that  
15 would support the verdict for any of them. And it's really a  
16 question of whether at the close of the evidence we've shown  
17 enough that would allow the jury to -- you know, to find that  
18 two of the individuals actually committed it.

19 THE COURT: All right. Let's move now to  
20 defendants' motion to preclude the plaintiff from seeking  
21 economic damages.

22 Let me ask plaintiff to state briefly. I was a  
23 little unclear. Maybe I am clear, but I just want to confirm.  
24 What categories are you claiming by way of economic damages?  
25 I think I read your submission only as to be future lost

1 earnings. Is there anything else?

2 MR. HARVIS: No, that's it.

3 THE COURT: Okay. And you're not introducing an  
4 expert; you're just submitting her testimony and any  
5 supporting documentation?

6 MR. HARVIS: Yeah. She was earning this amount and  
7 now she can't work anymore, and this is how many years, you  
8 know, she would be able to work. It's pretty much a lay  
9 argument.

10 THE COURT: Okay. So defendants, how are you  
11 prejudiced at this date, and especially I would ask you to  
12 just address given the sanctions history on your side why the  
13 very drastic remedy of precluding an entire category of  
14 damages should apply here given that she's not calling an  
15 expert so we're not talking about a Rule 26 report that wasn't  
16 disclosed in a timely fashion and we're really just talking  
17 about her testimony and you're free to cross-examine her on  
18 that?

19 MR. THADANI: Sure. I think the rule is there for a  
20 reason. They had to disclose her obligation. It clearly  
21 wasn't met. I think you referenced something I was going to  
22 reference. Given the history of the case and given the  
23 significant sanctions against the City with respect to  
24 discovery in this case to not have a sanction at some sort for  
25 the failure to disclose this information as it's required.

1           And, frankly, even forget about sanctions, I cited  
2 case law where I think it was something to the effect of,  
3 like, plaintiff proceeded at her peril. They indicated that  
4 they were going to provide this information and never did.  
5 And the prejudice is they didn't comply with the rules. They  
6 still haven't, by the way, even written a response to this,  
7 they could have supplemented their disclosures to give a  
8 calculation. They put, I think, 65,000 -- she was unemployed,  
9 by the way, or not unemployed. That will be an issue at  
10 trial. She gave inconsistent statements about her employment  
11 history at the time she was arrested.

12           But putting that aside, she actually was just about  
13 to get fired from her job that she was making the \$65,000 per  
14 year that they're using their calculation on apparently. And  
15 I don't know that \$65,000 times pick a number of years out of  
16 a hat is a sufficient calculation. But, moreover, the key is,  
17 the lack of disclosure. And there was a requirement to  
18 disclose and they chose not to do it.

19           THE COURT: Right. But preclusion is not a sanction  
20 that operates every time there's a violation of the obligation  
21 to disclose. So even if I agree with you that she should have  
22 affirmatively supplemented earlier, in what way are you  
23 prejudiced to the point where the high bar for precluding her  
24 from seeking an entire category of damages is met other than  
25 there should be some sanction and at this point if this goes

1 to trial, I may only have two options, allow her to testify on  
2 this or don't, allow them to seek those damages or don't? How  
3 does this really harm you because can't you just -- you know  
4 what the number is now, they've given you the information they  
5 intend to offer. How are you prejudiced?

6 MR. THADANI: No, that's fair.

7 THE COURT: All right. Okay. Let's talk about  
8 nominal damages then next. This is the plaintiff's motion  
9 that the jury not be instructed on nominal damages.

10 So I am inclined to defer this to the charge  
11 conference when we see what the actual testimony is that comes  
12 in about damages. I guess what I'm wondering is, for the  
13 defense on the excessive force claim, do you agree that if  
14 they find for the plaintiff on liability given that she has  
15 sustained some physical injury on excessive force or assault  
16 and battery, that a nominal damages instruction would not be  
17 appropriate? And what we're really talking about is whether  
18 she sustained any additional damages that are not nominal on  
19 the other two claims?

20 MR. THADANI: No.

21 THE COURT: You don't? Okay. Tell me why.

22 MR. THADANI: Okay. So with respect -- I mean we  
23 made our case with respect to the deliberate indifference  
24 claim. I think that's actually pretty strong, but your  
25 question was about the excessive force.



1           At trial there's going to be a lot of evidence with  
2   respect to these injuries. And, first of all, the -- yes, I  
3   mean, first of all, there's the different versions of events,  
4   but it's possible a jury could find part of both versions of  
5   events to be true and still find liability, that there was a  
6   use of excessive force and she punched the wall and injured  
7   herself. So at that point then, her damages result from that  
8   and not necessarily -- not necessarily the alleged excessive  
9   force that they're presenting. That's one.

10           Two is there's ultimate --

11           THE COURT: What excessive force would they find  
12   that she punched the wall and --

13           MR. THADANI: For instance, you could bend someone's  
14   finger back and not cause an injury verses you punch the wall  
15   and you cause an injury. And so they could find that doing  
16   this mechanism was excessive force under the circumstances but  
17   didn't cause necessarily any injuries sufficient enough to  
18   award compensatory damages.

19           The world exists. Do I think it's likely? Not  
20   necessarily, but it's possible. And it's not impossible. I  
21   think plaintiff tried to assert in their letter, it's  
22   impossible to find nominal damages if the jury finds on  
23   excessive force. I cited case law that indicates that in  
24   excessive forms claims -- I think even the case they cited  
25   from the Second Circuit indicated basically the position I

1 just presented to you.

2           Moreover, aside from just like the sequencing of  
3 events, there's also -- the medical records are fairly  
4 complicated here. There's some serious causation issue. She  
5 came in with a wrist wrap, arguably came in with the injury  
6 already, understandingly apparently normal. That's based on  
7 observations and what she says, not based on what the records  
8 show.

9           There's evidence that shows she reinjured herself  
10 over time or may have or subsequent trauma caused her injuries  
11 or long-term injuries, the nature of her work, she had  
12 degenerative conditions. There's a lot in the medical records  
13 about where her actual injuries came from as opposed to the  
14 use of force. So there is a world where they could find that  
15 the officers used excessive force, but it didn't cause  
16 sufficient injury to merit compensatory damages. That world  
17 exists.

18           THE COURT: All right. Any response on that point?

19           MR. HARVIS: No. I think we should talk about it at  
20 the charging conference.

21           THE COURT: Yes, I'm going to defer consideration of  
22 this until the charge conference. I appreciate your  
23 clarification and I am certainly thinking about the  
24 possibility of nominal damages on excessive force in a  
25 different way in light of your argument. I think given --

1 just to preview kind of the issues that we may want to focus  
2 on when we get to that point, I think given that in the Second  
3 Circuit case that both parties cited, some of the other case  
4 law I've reviewed on excessive force, the causation question  
5 typically comes from when the events are undisputed and the  
6 question is the reasonableness of the officers' use of force  
7 under the circumstance.

8           Here we're really talking about a plaintiff and  
9 defendants whose versions of what happened are diametrically  
10 opposed. And so I guess while I guess theoretically possible  
11 for the jury to credit both versions of events; on the one  
12 hand, they bent her thumb back and told her, you know, in sum  
13 and substance we're doing this because you're not cooperating;  
14 and on the other, she also self-harmed, I think that's  
15 extremely unlikely and we're creating a risk of error if we  
16 throw a nominal damages instruction in there because of that.  
17 But I certainly want to hear the medical evidence that you  
18 referenced and hear how the testimony comes in. So I'm going  
19 to defer consideration of this motion.

20           All right. Let's see if we can briefly discuss -- I  
21 do have a hard stop at around 6:15 -- defendants' motion to  
22 preclude the testimony of what I understand are three  
23 non-officer defendants witnesses, Pontecorvo, Trotter and  
24 Valerga.

25           MR. HARVIS: Your Honor said non-officer, but I

1 think you meant nonparty.

2 THE COURT: Sorry. Nonparty. Thank you for that  
3 correction. Nondefendant officers, not non-officer  
4 defendants.

5 So none of these three are defendants, am I right,  
6 that those are the only three that plaintiff may seek to call  
7 other than the individual defendants?

8 MR. HARVIS: Well, no, actually.

9 THE COURT: Other than for impeachment.

10 MR. HARVIS: Hold on one second. Sorry. I just  
11 want to -- I don't want to get this wrong. There were --  
12 we -- in our opposition, we talked about a couple of officers.

13 Did Your Honor mention Valerga? I'm sorry.

14 THE COURT: Yes. Trotter, Valerga and Pontecorvo.

15 MR. HARVIS: Then Your Honor is correct.

16 THE COURT: Let's talk about Trotter. To avoid  
17 deciding unnecessary issues, is there any likelihood he will  
18 actually be here since I gather he lives in Arizona and may be  
19 outside of the subpoena power of the Court?

20 MR. HARVIS: I guess not.

21 MR. THADANI: Yes, correct.

22 THE COURT: He has no intent to appear. Okay. If  
23 he shows up, we can address his testimony when it happens, but  
24 we will cross him off the list for now.

25 MR. HARVIS: Okay.

1           THE COURT: As to Valerga and Pontecorvo, I  
2 understand from plaintiff's submissions that there are --  
3 there is some documentation by Pontecorvo and Valerga --  
4 sorry, some documentation that Pontecorvo made a written entry  
5 regarding plaintiff's wounds being self-inflicted, and that  
6 Valerga was deposed and said there was, in his words, a quote,  
7 high probability, unquote, that he spoke with Defendant  
8 Laliberte the day after the incident about what happened. Is  
9 that right? Am I right about what arguably ties them to the  
10 case?

11           MR. HARVIS: Yeah. You know, Trotter was the one  
12 who -- both Trotter and Pontecorvo were at the hospital with  
13 Ms. Martinez when this mysterious entry is made in her record  
14 that a police officer reports that she was punching the wall.  
15 I think that the evidence -- I think that that's true. I  
16 think that they both were there. Nobody claims to remember  
17 anything, so, you know, it's not going to be a long  
18 examination. But I do think that there are questions that  
19 would be relevant to ask Pontecorvo about what happened at the  
20 hospital.

21           THE COURT: So given that record, you know, marginal  
22 though it may be for relevance, but certainly by their own  
23 statements tying them either to some account by the individual  
24 officer or officer defendants and at least one of them making  
25 an entry about what he was told or what he observed happened

1 to the plaintiff, why aren't we at least at the basic bar for  
2 relevancy and we can deal with scope of their testimony if and  
3 when they're called?

4 MR. FRANK: Your Honor, so I'm understanding, excuse  
5 me, that Pontecorvo was not at the hospital, so --

6 MR. HARVIS: Not at that time.

7 MR. FRANK: Not at that time. So his statement in  
8 the medical record, that statement that appeared in the  
9 medical record is also just not relevant to any of the claims  
10 or defenses at issue.

11 THE COURT: When you say it's your understanding,  
12 that's based on what, that he wasn't at the hospital?

13 MR. THADANI: It's based on his memo book and then  
14 the medical record. The time of the medical record and the  
15 time in the memo book for both Pontecorvo and Trotter of when  
16 Pontecorvo was there, the times don't match.

17 THE COURT: So what is your understanding as to why  
18 he wrote an entry in his -- am I confusing the witnesses?

19 MR. HARVIS: No. Your Honor, it's that Trotter said  
20 to -- Trotter at least seems to have said to the medical staff  
21 that Ms. Martinez was observed punching the wall. That's in  
22 her medical record. So it's not that Pontecorvo made a record  
23 in his own note. And Mr. Thadani may be right. I certainly,  
24 in my mind, thought of Trotter as being the more vital  
25 witness. So maybe we need to focus our efforts on getting him

1 back from Arizona rather than arguing about Pontecorvo. I  
2 think maybe we don't need Pontecorvo. What we really need is  
3 Trotter. But we certainly want to argue about Valerga.

4 THE COURT: Okay. Yeah, I don't think there's any  
5 point in calling a witness if the other records show he wasn't  
6 actually present to say what somebody else reported, if he's  
7 admitting that. I'm thinking of Pontecorvo in this regard.

8 MR. HARVIS: As I'm thinking about it though, now  
9 that I'm thinking through Trotter being in Arizona, I mean,  
10 I'm just not sure -- in our view -- I'm sure there's a  
11 dispute, but in plaintiff's view and I think in Judge Pollak's  
12 view, it's a critical fact that someone -- and we believe  
13 Trotter -- you know, told medical staff that Ms. Martinez was  
14 observed punching the wall because it raises all kinds of  
15 questions of, you know, this hasn't even been reported yet  
16 when this -- at the time stamp of the medical record shows the  
17 officers hadn't called this in yet. They were waiting to  
18 hear.

19 And so I'm just trying to think out loud about how  
20 that -- how that record is going to come in. And if Trotter  
21 is not there -- I think we may need to talk to the City about  
22 trying to come up with something so that we can deal with that  
23 issue. But I don't think that calling Pontecorvo is the  
24 answer.

25 THE COURT: Okay. Why wouldn't it come in through

1 the medical record? I mean, it's a statement that's in the  
2 medical record. I guess it's not a statement for diagnosis  
3 and treatment, but if no one is disputing that he made it --

4 MR. HARVIS: I see. Yeah.

5 THE COURT: I mean it might be a statement. It's  
6 not her statement for diagnosis and treatment, but he is an  
7 officer reporting to medical staff what he claims to have  
8 seen. I guess you're not claiming it's a statement offered  
9 for its truth; you're claiming it's offered for something  
10 totally different?

11 MR. HARVIS: Right. That would be our argument. I  
12 guess I want to give it some more thought, and I don't think  
13 it will be an issue. But if it is, we'll bring it to the  
14 Court's attention.

15 THE COURT: Why don't you confer and let me know if  
16 there's any remaining dispute about these witnesses, and I'll  
17 defer consideration of the motion until then.

18 MR. HARVIS: That sounds good to me.

19 THE COURT: All right. I'm going to ask very  
20 briefly. We've got two more to go on my list of things that  
21 are still in dispute that I had questions about.

22 One is plaintiff's motion to use leading questions  
23 on direct examination of nondefendant officer witnesses. I  
24 know that no one or the defense counsel is not disputing that  
25 they can lead the individual defendant officers when they call



1    them on direct, plaintiff I mean. And I guess for plaintiff,  
2    I have two brief questions for you.

3               One is, with respect to these non-officer defendant  
4    witnesses, if in fact they're called, I'm not sure if any are  
5    going to be called, you know, as you know, the prevailing  
6    practice in this district is to deny this without prejudice  
7    and give you leave to make the motion again if the witness  
8    proves hostile at trial.

9               Is there any reason why I shouldn't do that here?  
10   Any specific reason why you need to know in advance how  
11   they'll be treated?

12              MR. HARVIS: No, not really. I just say we do have  
13   their deposition testimony, so I think that gives us a little  
14   bit more insight into how they're going to testify. So I  
15   think that might make it unnecessary to defer it. But  
16   certainly we don't have any objection if that's how the Court  
17   wants to proceed.

18              THE COURT: I think that's probably easier. I mean  
19   I think to the extent especially that they're claiming lack of  
20   recollection and in light of Judge Pollak's decision, my  
21   inclination is to give you some reign to lead them, but let's  
22   see who's called and see what the issues are and we'll take it  
23   from there. All right?

24              MR. HARVIS: Sounds good.

25              (Continued on the next page.)

1 (Continuing.)

2 THE COURT: Okay. Last motions and then we still  
3 have some other matters to address. The motion to admit --  
4 this is plaintiff's motion to admit defendant's Rule 36  
5 submissions.

6 You know, I'm aware of and I tend to agree with your  
7 position that these are binding admissions. I guess I'd just  
8 ask the City to address plaintiff's argument that the whole  
9 purpose of these admissions during discovery is to narrow the  
10 issues in dispute of trial, and even if plaintiff could bring  
11 this in by other means, that's not really for me to decide.  
12 Once you've admitted it, they can present the evidence in the  
13 fashion they think is best.

14 MR. THADANI: Sure. So you know, I think that I was  
15 unclear what they were asking me for, because they presented  
16 at stipulations initially. So to the extent, as Your Honor  
17 may know, we went through each one and for some of the them it  
18 was just the witness is going to testify. There's no need for  
19 a stipulation. To the extent that that's not what they're  
20 seeking, per se, which it sounds like they're not, I don't  
21 think those are the disputed one. I think that the crux of  
22 the argument really from our perspective to the extent it was  
23 lost, like, I want to reiterate, is really about  
24 admissibility. So a lot these facts -- quote, unquote, facts  
25 related to a lot of the other issues we've been talking about

1 today. There are facts about the prisoner pedigree card,  
2 about the prisoner roster form, about Hanrahan's reports  
3 errors, about needing to give Miranda warnings. Really  
4 almost -- I mean, I have the specific numbers, but I mean,  
5 most of them, there's a another motion in limine that bears on  
6 it, and I cited cases and treatises which speaks to the issues  
7 of just because there's an admission -- we're not running away  
8 from them -- but just because there's an admission does not  
9 mean it's admissible at trial because they're subject to rules  
10 of admissibility.

11 And so really understanding, maybe putting aside the  
12 ones where we argued with respect to the -- this is undisputed  
13 or the witness can testify, putting those aside, there are  
14 other ones that really speak more to admissibility, and then  
15 there are a few, a handful that speak to completeness where  
16 our admission was lengthier and they excerpted to take out  
17 context of some of our admissions. So to the extent that  
18 there's an admission, it's the entire admission, not let's  
19 just take the second half of the sentence, not the first half  
20 of the sentence.

21 THE COURT: Understood. Okay. So why don't we do  
22 this, I hear your point, and I tend to agree with you that  
23 some of this on relevancy depends on what my rulings are on  
24 the other disputed motions. So with the expectation and hope  
25 that I will get you a ruling on that sufficiently in advance

1 of trial for you to confer on these, after you receive my  
2 rulings on the other motions in limine, plaintiff's counsel,  
3 why don't you provide your adversary with a statement of any  
4 admissions you seek to offer tailored to the relevancy of  
5 what's coming into the case, do your best to agree on the  
6 language of those and what would come in, and hopefully,  
7 before the final pretrial conference, you can let me know if  
8 you've agreed, or if there's anything still in dispute. And,  
9 you know, can you address this at this time, but think about  
10 how you'd like it to come in, if you want it to be something  
11 read to the jury at the close the evidence or once we agree on  
12 the language, you know, and the testimony, the appropriate  
13 witness, just let me know.

14           Okay. All right. I think that's all I have on the  
15 disputed motions. I know there are some other motions  
16 outstanding.

17           Mr. Thadani, you're looking as if you had something  
18 else to say on that point.

19           MR. THADANI: No. I just want to flag before the  
20 conference ends, three just, like, housekeeping points we  
21 wanted to raise, but it doesn't have to be now.

22           THE COURT: That's fine. Let me go through a few  
23 things that I have. I think we'll probably still have some  
24 time for that, and if not, we can address it at the next  
25 conference, or if you need to have it addressed before then,

1 you can raise it with me in a letter.

2 Okay. I noticed this was not actually the subject  
3 of an independent motion from the defense, but that plaintiff  
4 had listed, by my count, around 20 treating physicians as  
5 potential witnesses in your joint pretrial order.

6 You know, I certainly think that I would, if you  
7 actually attempted to call 20, ask you to limit them.

8 MR. HARVIS: We're not going to be doing that. I  
9 think it's probably a handful, less than five, I think, and we  
10 can try to get that list to the City -- to defense counsel,  
11 you know, in advance of the final pretrial conference or as  
12 soon as possible.

13 THE COURT: Okay. I think in advance, if you can,  
14 and maybe ideally by before the Thanksgiving break, so if  
15 there are any issues, we can address those.

16 Yes.

17 MS. McKINNEY: And Your Honor, that was one of the  
18 defendant's housekeeping points was to request that if  
19 plaintiff could provide a more refined list of the treating  
20 physicians that they do intend to call. We do request -- I  
21 think it would be helpful to provide a deadline.

22 Could we set a deadline at today's conference for  
23 when they could provide us that list and also an order, if  
24 possible, of those witnesses, as well.

25 THE COURT: Why don't we deal with the witness order

1 point separately.

2 But do you have a timeframe in mind as to when you  
3 think you can provide the list? I know because they're  
4 doctors, it may depend on their availability.

5 MR. HARVIS: Precisely. I would say -- can we say  
6 November 21st.

7 Is that okay?

8 THE COURT: That is nine-ish days in advance of  
9 trial.

10 MR. HARVIS: How about the 18th, Your Honor?

11 THE COURT: Sure. Why don't we say the 18th.

12 So November 18th. And, you know, I know that none  
13 of them are going to be offered as experts. I will say I know  
14 that particularly when one doctor works for, say, Queens  
15 Medical Center, it's standard for them to review the patient's  
16 chart and rely on the history notes to the extent that that  
17 was something they actually relied on in the course of their  
18 treatment of plaintiff, not something that they're looking  
19 back at now. But, you know, subject to that bound, they're  
20 obviously not going to be given any opinions other than those  
21 formed during their own diagnosis and treatment.

22 MR. HARVIS: Right.

23 THE COURT: Okay. All right. I think you may have  
24 addressed this in our discussion about other misconduct.

25 There was an issue that came up, I think, as Ms. McKinney may

1 recall, I was observing Judge Kovner's trial in the Burnet  
2 matter that she handled very deftly a weeks ago, and there was  
3 an issue that came up mid-trial about adverse credibility  
4 findings from one of the defendant's officers -- defendant  
5 officers in an unrelated case, but on a list that was  
6 maintained by the Queens County District Attorney for officers  
7 who had been found by a Court to have not been credible in  
8 that proceeding, and Judge Kovner ruled on the spot that it  
9 was admissible because it went to credibility. It's a very  
10 fact-specific inquiry. It would depend on the circumstances.  
11 I would prefer not to have to deal with that mid-trial, so I  
12 wanted to see if either party had inquired of the Queens  
13 District Attorney as to whether any of the individual  
14 defendants had had such a finding since there's now a central  
15 list that I gather is maintained. That should be something  
16 that the parties could find out relatively quickly. But if  
17 any of the defendants happen to have that history and are on  
18 the Queens DA's list, and you know, if it's not an issue, if  
19 nobody seeks to present it, it's not an issue for me. But if  
20 either party -- I presume the plaintiff in this case seeks to  
21 present it, it's something I would appreciate knowing about in  
22 advance of trial.

23 MR. HARVIS: Yeah, okay. I don't have that  
24 information right now. But we will find out the answer, and  
25 if there is -- if we find out in the affirmative, we'll submit

1 a letter to Your Honor.

2 THE COURT: I think that would be great. I think  
3 you can confer with your opposing counsel and see if they  
4 agree that it's properly the subject for impeachment under 608  
5 or otherwise, if there's any objection to it coming in in the  
6 cross of an officer. If there's a problem, let me know the  
7 dispute.

8 It also may be -- I don't know if other than defense  
9 counsel in criminal cases, if plaintiffs in civil cases are  
10 permitted to access that information or whether it's something  
11 that only the City as counsel to those officers can get.  
12 Obviously, you know, you have no reason necessarily to know  
13 about it before, but it would be something that if you knew  
14 about in the ordinary course of discovery, would be exchanged.  
15 I don't think this list even existed at the time you were all  
16 doing discovery in this case. So it may be simpler and faster  
17 for the City to make that inquiry as counsel for the officers,  
18 so if they don't have any objection to that --

19 My mic just went out. Are they shutting us down?

20 All right. Thank you.

21 MR. HARVIS: We would certainly appreciate that if  
22 the City is able to make that inquiry, that would obviously be  
23 much easier than us trying to do it.

24 MR. THADANI: I don't know. So I mean, I'm not  
25 saying no. I don't know what the process is for that. So I



1 can look into it.

2 THE COURT: I know Ms. McKinney, you probably have  
3 the document that was used in your trial, so perhaps, you  
4 could use that for reference. I think if you contact the  
5 executive office of the Queens District Attorney and just let  
6 them know this is the list that sometimes they call it the  
7 Brady list, sometimes they call it the adverse credibility  
8 findings you're inquiring about, and give them the officers'  
9 names, they could probably tell you pretty quickly whether  
10 it's on, and if you would like to say the judge directed you  
11 to make that inquiry, you're free to do so.

12 MS. McKINNEY: I do know a liaison at the Queens  
13 DA's Office that I would be happy to reach out to with that  
14 inquiry.

15 THE COURT: Terrific. Thank you.

16 Lastly, joint pretrial order, it's very long,  
17 includes a lot of exhibits that I suspect I'm going to give  
18 you all the benefit of the doubt and say that you were being  
19 over-inclusive to avoid any preclusion problems.

20 I do think it would be Helpful, particularly for  
21 plaintiff to narrow down just as you have with the plaintiffs,  
22 narrow down the list of exhibits. I know you're waiting for  
23 my ruling on a number of these motions. So I was thinking  
24 that you could narrow down your proposed exhibits, as well as  
25 any objections that you may have, and submit it by the end of

1 the day, meaning, midnight on Monday November 21st.

2 Does that seem workable?

3 MR. HARVIS: Sure. A lot of them were already  
4 intentionally blank, so I'm just saying it's a little  
5 deceptive, the number.

6 MR. THADANI: It's not 300, it's 200.

7 THE COURT: Okay. Scheduling-wise, as you guys --  
8 sorry, you all probably know from reviewing my rules,  
9 typically -- there is no typical, given how new I am to this  
10 job, but I've been asking for proposed voir dire, verdict  
11 sheets, and jury charges to come in 10 days before jury  
12 selection. We have the Thanksgiving holiday, but the 10 days  
13 would fall on a Sunday, so Monday which I think is the 21st  
14 would also be the day I'd ask you to submit those.

15 MR. THADANI: I thought it was two weeks.

16 Am I wrong about that?

17 THE COURT: It may have -- you know what, you may be  
18 correct, and you may know my rules better than I do at this  
19 point.

20 MR. THADANI: I try. That's what I have in my  
21 calendar.

22 THE COURT: Okay. I'll welcome them sooner. I  
23 thought given the timeframe, given that you're still waiting  
24 on the rulings on my motions in limine, if you'd like to have  
25 until the 21st, you can. If you'd like to do them before the

1 weekend, that's certainly appreciated.

2           Okay. I want to talk to you briefly about voir  
3 dire. So I am going to actually do a written questionnaire.  
4 In my experience, it actually saves a lot of time, and then  
5 rather than have the individual jurors tell everybody out loud  
6 how many children they have and do they have any lawyers in  
7 their family, we could just do that on the questionnaire and  
8 save the more complicated and revealing questions about  
9 things, like, potential biases, all of that, for the  
10 individual questioning.

11           I also think it tends to work better especially in  
12 cases of this type where jurors may have some strong feelings  
13 on either side, to question them not at sidebar, but in the  
14 jury room. So what I'd like to do is have a questionnaire  
15 that has the biographical information in there, which would  
16 include are things, like, lawyers this their family, law  
17 enforcement members in their family, that sort of thing that  
18 we may want to follow up on with individual questions. Have  
19 them do that with the written questionnaire, I'll then give  
20 you time to review it, maybe half an hour or so, then I'll  
21 deal with hardships. We could do those at sidebars. Deal  
22 with the hardships first. Once we have a pool of people who  
23 have not been excused for hardships, we can take the first 14  
24 and go to the jury room and question them one on one. And  
25 since we're doing it there, I don't have any objection to your

1 clients being present. Obviously, they can't participate, but  
2 I think sometimes it can be helpful for clients to share with  
3 you their take on potential jurors when it comes time to do  
4 the peremptories.

5 And I will probably rule on the cause challenges one  
6 by one. I don't trust my memory to remember who said what  
7 seven jurors ago. I had enough trouble following along when I  
8 was observing other judges do it, much less doing it on my  
9 own. So you all should just be prepared to address the  
10 for-cause challenges as they get excused one by one. All  
11 right.

12 And the rest, we can talk about at the final  
13 pretrial conference.

14 Did we set a date for that yet?

15 THE COURTROOM DEPUTY: The 28th.

16 THE COURT: The 28th, okay. So the 28th, the  
17 afternoon of the 28th, I believe. All right. Good.

18 Lastly, but certainly not least, any potential  
19 vehicle or avenue for settlement discussions at this point?

20 Have you spoken recently with your clients about  
21 that possibility?

22 MR. HARVIS: No. We haven't -- I mean, I -- is it  
23 okay if we go off the record just for the --

24 THE COURT: Sure. We'll go off the record.  
25 (Whereupon, an off-the-record discussion was held at this

1 time.)

2 THE COURT: Let's go back on the record.

3 Before we adjourn, I have nothing else.

4 Any of the parties have anything else you'd like me  
5 to address?

6 MR. HARVIS: No. Nothing from plaintiff. Thank you  
7 for your time. I appreciate it. It's been so generous.  
8 Thank you.

9 MR. THADANI: I still do have three things.

10 THE COURT: Okay.

11 MR. THADANI: They're short, I think.

12 One is, I just want to the confirm that you will not  
13 be holding trial on Fridays?

14 THE COURT: Thank you for that question. I meant to  
15 address it.

16 So actually, unfortunately or fortunately, I am  
17 going to be holding trial that Friday. I believe it's  
18 December 2nd, perhaps.

19 Is that right? Yes. Okay.

20 Yeah, because we're starting on a Wednesday, rather  
21 than have the jury start, appear a day and a half or so of  
22 testimony and argument and then take a three-day break, I am  
23 inclined to do a half day on Friday just to give me time to do  
24 some other matters and give you a break. So I think we'll  
25 probably go up to the lunch break at 1:00, and then excuse the

1 jurors and excuse you, and then we can reconvene on Monday.

2 MR. THADANI: I'm glad I asked that question.

3 THE COURT: I am too.

4 MR. THADANI: The other one is, so I think we left  
5 it with the three nonparty police officers Pontecorvo,  
6 Trotter, and Valerga. Plaintiff's counsel is going to  
7 consider their position, we'll confer and see if there are  
8 disputes.

9 Do I have that right?

10 MR. HARVIS: That sounds good to me.

11 MR. THADANI: I just wanted to the flag one other  
12 individual. I don't know if this was an inadvertent mistake  
13 or you know, I'm not sure. There's another nonparty. His  
14 last name is Ripple. He is on the witness list, he was not in  
15 the list of individuals plaintiff's counsel indicated no  
16 longer seeking to call. So I just --

17 MR. HARVIS: We don't need to call him.

18 MR. THADANI: There you go. That's taken care of.

19 So the last one is really, is there guidance in  
20 terms of if we want to schedule a tech walk-through.

21 Let me back up.

22 Do you know whether the trial is going to happen in  
23 this courtroom?

24 THE COURT: It is going to be in this courtroom.

25 MR. THADANI: Okay. And to the extent that that's

1 the case, is there some guidance to schedule, like, an -- an  
2 opportunity work with the technology and get familiar with it?

3 THE COURT: Yes. The good news is, at this  
4 juncture, I do not have a lot scheduled in this courtroom over  
5 the next few weeks. We have some occasional conferences, but  
6 a lot of them are by phone, and as of now, only one or two  
7 other hearings. So there should be plenty of time, so I think  
8 you should contact my deputy Freddie Valderrama, and you're  
9 welcome to have that time.

10 And we are trying to ensure that the screen has good  
11 enough resolution for your exhibits to be seen. I know that's  
12 been an issue in some other parts of the courthouse, but we're  
13 working on that with IT.

14 MR. THADANI: That is all I have.

15 THE COURT: And if you want to come in over  
16 Thanksgiving break to do a tech walk-through, it'll be nice  
17 and empty. I'm kidding. No one will be here. But we'll do  
18 it as close in time as possible.

19 Anything else?

20 MR. HARVIS: Not from plaintiff.

21 THE COURT: All right. With that, we're adjourned.

22 (Whereupon, the matter was concluded.)

23 \* \* \* \* \*

24

25